No. 73-1742

In the Supreme Court of the United States

OCTOBER TERM, 1973

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RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-52a) is reported at 489 F.2d 390.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1974 (App. B, *infra*, pp. 53a-54a). On May 8, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including May 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Environmental Protection Agency must disapprove provisions of state implementation plans under the Clean Air Act which authorize the states to grant interim variances from the state plan under the revision authority of Section 110(a)(3) of the Act, prior to the effective date of the Act's mandatory deadlines.

STATUTE INVOLVED

The Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857, *et seq.*, are set forth in relevant part in Appendix C, *infra*, pp. 55a-64a.

STATEMENT

This case is an action to review the approval by the Environmental Protection Agency of the Georgia state plan for achieving the national ambient air quality standards required by the Clean Air Act Amendments of 1970. It involves the power of States to grant variances from their implementation plans prior to the statutory deadlines for attainment of the national primary standards—generally mid-1975.

1. Section 110 of the Clean Air Act, as amended, 42 U.S.C. 1857c-5, requires each State, after notice and public hearings, to adopt and submit to the Environmental Protection Agency a plan for the implementation, maintenance and enforcement of the national primary and secondary ambient air quality standards [1] in each air quality control region in that State.

Under Section 110(a)(2)(A), 42 U.S.C. 1857c-5(a)(2)(A), the national primary standards must be achieved "as expeditiously as practicable but [unless an extension of up to two years is granted under Section 110(e), 42 U.S.C. 1857c-5(e)] in no case later than three years from the date of approval of such plan." This three-year statutory deadline is generally in mid-1975, unless an extension under Section 110(e) has been granted.[2]

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[1] National primary ambient air quality standards are those "requisite to protect the public health," while the national secondary ambient air quality standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109(b), 42 U.S.C. 1857c-4(b).

[2] The mandatory compliance dates for the States of the Fifth Circuit are:

Alabama: July 1975 for all national standards except: carbon monoxide in the Metropolitan Birmingham Intrastate Region, May 31, 1975; photochemical oxidant (hydrocarbons) in the Mobile—Pensacola—Panama City—Southern Mississippi Interstate Region, May 31, 1975, and photochemical oxidants (hydrocarbons) in the Metropolitan Birmingham Intrastate Region, May 31, 1977 (40 C.F.R. 52.54).

[Footnote continued on page 4]

The Administrator, on May 31, 1972, disapproved portions of the Georgia Plan and approved the rest of the Plan. 37 Fed. Reg. 10842, 10859-10860. The Natural Resources Defense Council, Inc., and others sought direct review in the Court of Appeals for the Fifth Circuit of the Administrator's approval of parts of the implementation plan for the State of Georgia, as authorized by Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 1857h-5(b)(1). The court of appeals held in part that the Administrator's approval of the Georgia Plan violated the Clean Air Act because the Plan authorizes the State to grant variances from the Plan's requirements without com-

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[2] [Continued]

Florida: July 1975 for all national standards (40 C.F.R. 52.523).

Georgia: July 1975 for all national standards (40 C.F.R. 52.575).

Louisiana: July 1975 for all national standards except for photochemical oxidants (hydrocarbons) in the Southern Louisiana, Southeast Texas Interstate Region, May 31, 1975 (40 C.F.R. 52.979).

Mississippi: June 1975 for all national standards (40 C.F.R. 52.1273).

Texas: July 1975 for all national standards, except for photochemical oxidants (hydrocarbons) in the following regions: Austin—Waco Intrastate, May 31, 1975; Corpus Christi—Victoria Intrastate, May 31, 1975; Metropolitan Houston—Galveston Intrastate, May 31, 1977; Metropolitan Dallas—Fort Worth Intrastate, June 30, 1976; Metropolitan San Antonio Intrastate, May 31, 1977; Southern Louisiana—Southeast Texas Interstate, May 31, 1975; El Paso—Las Cruces—Alamogordo Interstate, May 31, 1975 (40 C.F.R. 52.2279 as amended November 6, 1973, 38 Fed. Reg. 30642).

plying with the postponement provisions of Section 110(f) of the Act.

2. This case comes to the Court in the following context. When the Environmental Protection Agency promulgated its guidelines for the preparation of state implementation plans, it took the position, in what is now 40 C.F.R. 51.32(f), that the provisions of Section 110(f) of the Act do not apply to all exceptions, but only to those that would affect the ability of the state to achieve the national primary standards "as expeditiously as practicable" and the secondary standards "within a reasonable time" (Section 110(a)(2)(A)) or to remain in compliance with those standards once they had been achieved. Variances that would not have such an effect were to be treated not as requests for exceptions under Section 110(f) but as applications for revisions of the plan under Section 110(a)(3) of the Act and were to satisfy the requirements of that Section rather than Section 110(f).[3] The states acted in reliance upon this interpretation of the Act in preparing their implementation plans.

As a practical matter, the authority granted by this construction of the Act is particularly important prior to the effective date of the national standards, since it is in the early years of the program that sources are likely to have reasonable grounds for asserting that they are unable to comply immediately with the standards. Many states, relying on the con-

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[3] The significance of the difference between these two procedures is explained *infra* at pp. 9-10.

tinuing power to grant variances, adopted implementation plans with emission standards having immediately effective dates as to all sources. Then, as to sources that could not feasibly be brought into compliance immediately, variances were granted subject to compliance schedules that would bring those sources into compliance with the national standards "as expeditiously as practicable." These states intended to defer the applicability of their immediately effective regulations in individual cases only where necessary, by placing sources on expeditious but reasonable compliance schedules as a condition of granting variances. The advantage of this early compliance date approach is that it makes all sources aware that, without such a variance, they are subject to presently effective legal standards, rather than just to the threat of such standards at a future date. The implementation plans of the Fifth Circuit States of Alabama, Georgia, Mississippi, Louisiana and Texas [4] followed this approach. Other states (only Florida in the Fifth Circuit) [5] made their emission regulations effective at the latest possible date allowed by the Clean Air Act —generally mid-1975. Such states have no need to grant variances prior to the effective date of their implementation plans.

The National Resources Defense Council filed actions in several courts of appeals challenging the Agency's approval of state implementation plans on the ground, among others, that the procedures of

[4] The Texas compliance date is December 31, 1973.

[5] The Florida compliance date is July 1975.

Section 110(f) apply to any action by a state at any time relieving any source from the requirements of the state's own plan. As will be developed further below, the Council relied on the literal language of Section 110(f) while the Administrator relied on the language of Section 110(a)(3), the structure and purpose of the statute and the legislative history. The first case to be decided on this point was decided by the Court of Appeals for the First Circuit on May 2, 1973. *National Resources Defense Council* v. *Environmental Protection Agency*, 478 F. 2d 875. That court determined that, given the structure of the congressional plan, it was necessary to distinguish between the pre-deadline and post-deadline periods. During the post-deadline period, that court held, permitting variances without following the formal procedures of Section 110(f) would be contrary to the congressional scheme. But as to the pre-deadline period the First Circuit held that variance authority is consistent with the statute. Although this solomonesque construction requires creative reading of the statute's literal language, it is a reasonable and workable solution to the complex ambiguities of the Act. Upon review of this decision, the Administrator and the Solicitor General determined not to seek Supreme Court review, and the Agency is conforming its regulations and procedures to this construction of the statute.

This construction was subsequently followed by the Eighth Circuit, *National Resources Defense Council* v. *Environmental Protection Agency*, 483 F.2d 690,

693-694. In the present case, however, the Fifth Circuit rejected the First Circuit's construction of the Act, the construction now adopted by the Agency, and held that Section 110(f) provides the exclusive procedure by which a state may authorize variances from its implementation plan. Thereafter, the Second Circuit also adopted the approach of the First and Eighth Circuits, and specifically rejected the approach of the Fifth Circuit in the present case. *National Resources Defense Council* v. *United States Environmental Protection Agency*, Nos. 72-1728 and 72-2165, decided March 13, 1974.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below would disrupt the orderly administration of the Clean Air Act and the economies of those states in the Fifth Circuit that, in reasonable reliance on their power to grant variances, adopted implementation plans with early effective compliance dates. Indeed, if the stay motion which accompanies this petition is not granted, the Administrator will be unable to approve some 1,400 variances now noticed in the Federal Register for approval or disapproval.[6] If this happens, continued emissions by those sources will be illegal until such time as the states and the Agency have been able to reprocess these applications in conformity

[6] These variances were submitted by the States of Mississippi and Alabama. An additional 600 variances from these states are ready for notice publication. As of May 15, 1974, another 800 variances are expected from Georgia, 200 from Louisiana and 21 from Texas for major sources.

with Section 110(f). Neither the states nor the Agency are in a position to do this on an expeditious basis.

Under Section 110(f), a postponement may be requested only by the governor of a state, and only for one year. The Section 110(f) postponement procedures would, if applicable, require EPA to hold an adjudicatory-type hearing, after notice to interested parties, before approving a state-requested variance. The EPA could approve the postponement only if the Administrator had determined, on the basis of the entire record with a formal statement of his findings and conclusions, that:

> (A) good faith efforts have been made to comply with such requirement before such date,
>
> (B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,
>
> (C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and
>
> (D) the continued operation of such source is essential to national security or to the public health or welfare,
>
> then the Administrator shall grant a postponement of such requirement.[7]

In contrast, under Section 110(a)(3), the Agency need only publish the proposed variance in the Fed-

[7] Section 110(f) is reproduced in full at App. C, *infra*, pp. 62a-64a.

eral Register, receive public comments, and determine that the variance is consistent with the requirements applicable to the original plan, *i.e.*, the requirements of Section 110(a)(2).

2. As previously noted (pp. 7-8, *supra*) the decision below is in conflict with decisions of the First, Second, and Eighth Circuits. Not only does the construction of the Act adopted by the Fifth Circuit discriminate against states which adopted implementation plans with early compliance dates, an environmentally sound approach favored by the Agency, but this conflict in the circuits means that only such states located in the Fifth Circuit (and, particularly, industries located in those states) would be subject to this discriminatory construction. Although the issue relates only to the time period prior to the mandatory attainment dates for the national ambient standards, generally mid-1975 but in some instances as late as mid-1977, it is an issue vital to the scheme of the Act for achieving an orderly transition from pre-attainment to post-attainment requirements, and an issue of significant economic importance to the states adversely affected.

3. The decision below is in error. The First Circuit, in arriving at its construction of the Act, was impressed by the anomaly of requiring States to use the Section 110(f) procedure prior to the congressionally imposed mandatory deadline, since Section 110(f) permits a maximum postponement of only one year, while the statute envisages that expeditious progress may take as long as five years. For states

with immediately effective plans, the possibility of a five-year grace period would thus become illusory. The First Circuit stated (478 F.2d at 887):

> The provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of standards. A state plan must provide for attainment of primary standards "as expeditiously as practicable but * * * in no case later than three years from the date of approval * * *", and of secondary standards "within a reasonable time" as stated in the plan. § 1857c-5(a)(2)(A).
>
> A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the "as expeditiously as practicable" language. § 1857c-5(a)(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.
>
> The Administrator sees his power to allow such exemption procedures as deriving from the "revision" authority in § 1857c-5(a)(3). We tend to view it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period. We

do not doubt the Administrator's power to approve reasonable mechanisms for state and local deferrals of control strategy, provided they cease before the mandatory compliance date and the individual variances are not granted without his specific approval.

The court below rejected the First Circuit's holding on this variance issue and held that the States must petition EPA for a postponement, following the cumbersome machinery of Section 110(f), for all variances, deferrals or postponements, whether before or after the mandatory date of compliance with the Clean Air Act. The court below stated (App. A, *infra*, pp. 25a-26a):

> We are unable to agree that the statute envisions granting the states the kind of "flexibility" during the "pre-attainment period" which provisions like Georgia's section 88-912 would afford. The parts of the statute on which the First Circuit relied were the provision of section 1857c-5(a)(2)(A)(i) that primary standards had to be met, not immediately, but only "as expeditiously as practicable", but in no case later than three years from the adoption of the state plan, and the provision of section 1857c-5(e) for a possible two-year extension of the deadline in sharply restricted circumstances. The First Circuit said that "[t]he provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of *standards*." 478 F.2d at 887 (emphasis supplied).

This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their schedule dates—set by the implementation plan—arrived. We think that the provisions of section 1857c-5(a)(2)(A)(i) and section 1857c-5(e) do not provide *any* support for the later conclusion. Nor do we find any support for that conclusion anywhere in the statute. Instead we find that the statute as a whole supports the general view of its overall strategy we articulated above; that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need. That view precludes the conclusion that Congress intended the states to have the kind of "flexibility" state variance plans would give them.

Significantly, however, the "ambitious commitments" which were in fact obtained in the implementation plans of Georgia and other states were obtained in part because of the existence of variance authority which made those commitments feasible during the transition stage. By leaving Georgia with its commitments but striking from the plan the mechanism which made those commitments feasible,

the decision below would disrupt the orderly working of the congressional scheme.

The opinion below ignores the only relevant legislative history. When Senator Muskie presented the Conference Report, he read into the record a Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970. This Summary, in discussing Section 110 of the Act, briefly described the provision of Section 110(e), which permits the governor of a State, when the State's implementation plan is submitted, to request a two-year extension of the mandatory deadline. The Summary's description of Section 110(e) shows that the statutory mention of "the deadline" referred to the mandatory three-year deadline. The Summary stated (116 Cong. Rec. 42384):

> If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of the deadline up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension.

Immediately thereafter the Summary briefly discussed the provisions of Section 110(f), the postponement provision at issue here. The Summary's description of Section 110(f) stated (116 Cong. Rec. 42384-42385):

> A Governor may also apply for a postponement of the deadline if, when the deadline approaches,

> it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such a postponement is subject to judicial review.

In context, it is clear that this "deadline" is the mandatory three-year deadline just discussed in the preceding paragraph.

Thus, in the only relevant legislative history, Congress revealed its intention to require states to employ the complex Section 110(f) postponement procedure only when the mandatory three-year deadline would be affected, not for every delay or deferral of state-imposed requirements which does not affect the achievement of the standards within the statutory time requirements.

The opinion below narrowly focuses on the language of Section 110(f), which speaks of postponement of the date of compliance "with any requirement" of a state plan. Taken out of context, this language supports the court's holding. The Environmental Protection Agency, however, was authorized by Congress, under Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3), to approve "any revision" of an implementation plan which meets the same requirements that obtain for approval of original implementation plans, that is, the requirements of Section 110(a)(2). EPA has accordingly considered a deferral of a date of compli-

ance (a variance), prior to the statutory date of attaining the primary standards, to be a revision of the state plan which it is authorized to approve under Section 110(a)(3), 40 C.F.R. 51.6, 51.32(f).

Relying on its authority under Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3), and the construction of the statute by the First Circuit, EPA has adopted a reasonable interpretation of the Clean Air Act whereby it will review and, if acceptable, approve state variances conditioned upon compliance schedules meeting the requirements of Section 110(a)(2) prior to the statutory deadline. Thus, EPA will not approve a variance unless it is convinced that, in addition to requiring compliance prior to the statutory deadline, the terms of the compliance schedule accompanying the variance reflect the most expeditious progress practicable toward achievement of the national primary standards and achievement of the secondary standards within a reasonable time. This reasonable construction of the Act has been adopted by the agency primarily responsible for its enforcement and by the three courts of appeals other than the court below which have passed on the question and should, in fairness, be applied uniformly throughout the Nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 72-2402

NATURAL RESOURCES DEFENSE COUNCIL, INC., Project on Clean Air, Save America's Vital Environment, Inc., Janey Weber and Susanne Allstrom,
PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

Feb. 8, 1974

Before WISDOM, DYER and INGRAHAM, Circuit Judges.

WISDOM, Circuit Judge:

The petitioners in this case are two non-profit corporations, Natural Resources Defense Council (NRDC) and Save America's Vital Environment (SAVE), and two individual citizens. They seek review of an order of the Administrator of the Environmental Protection Agency (EPA), approving the State of Georgia's plan for achieving the federal ambient air quality standards under the Clean Air Act Amendments of 1970.[1] Petitioners raise four objec-

[1] 42 U.S.C. §§ 1857-58a (1970). The Clean Air Act was originally enacted in 1963, Pub.L. No. 88-206, 77 Stat. 392,

tions to the Administrator's action on the Georgia Plan. These concern (1) a provision of that Plan guaranteeing the confidentiality of secret trade information supplied to Georgia pollution control officials; (2) a provision allowing Georgia officials to grant variances from particular requirements of the Plan; (3) Georgia's adoption of a "control strategy" allowing "sources" of sulfur dioxide and particulate matter emissions, e. g. manufacturing plants, to avoid the necessity of installing emission reduction equipment by increasing the height of their smokestacks; and (4) provisions of the Plan directing Georgia officials to take into account economic impact and technological feasibility in the discharge of their duties under the state's air pollution control statutes. We conclude that in approving each of the challenged provisions of the Georgia Plan, the Administrator exceeded his authority under the Clean Air Act Amendments, and order him to take appropriate corrective action.

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and amended in relatively minor ways three times during the following seven years. Its present form, however, derives almost entirely from the amendments adopted in 1970. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Throughout the opinion, we use the "Act" and the "Amendments" interchangeably.

The petitioners challenge an order made by the Administrator under 42 U.S.C. § 1857c-5(a)(2). Jurisdiction in this court is conferred by 42 U.S.C. § 1857h-5(b)(1), which confers jurisdiction on the appropriate circuit courts of appeals to hear petitions for review of orders of the Administrator approving state implementation plans under section 1857c-5(a)(2). *See* note 19 *infra*.

We begin with a necessary discussion of the provisions of the Clean Air Act Amendments of 1970 relevant to the issues in this case.

I.

The Clean Air Act Amendments of 1970 establish a program for controlling air pollution that involves two phases of standard-setting. The first phase is the setting of what the Amendments call "ambient air quality standards". These are standards designating the maximum tolerable concentrations in the ambient air of substances identifiable as pollutants. The second is the establishment of specific controls enforceable against individual sources of emissions, designed to limit the permissible quantities of matter emitted into the air, or to control the timing, rate, or manner of emissions.[2] The changes in the ambient

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[2] For our purposes in addressing the issues in this case, in particular the third objection raised by the petitioners, it is necessary to explain three terms used to define different categories of the kinds of "enforceable controls" which may be employed to effect attainment of ambient air standards. The first, "emission standards", refers to standards setting specific quantitative limits on the amounts given individual sources may emit into the air. The second, "emission limitations", is an inclusive term referring to any type of control to reduce the amount of emissions into the air. This includes, of course, "emission standards", but it also includes a number of regulatory devices. These range from regulations directing sources of emissions to cease or curtail operations to regulations specifying limits on the sulfur content of fuel that fuel-burning emission sources may burn; "transportation controls" designed to reduce the use of motor vehicl , either through the development of mass transit systems, or through

levels of pollutant concentrations by these various enforceable controls are calculated largely through a technique known as diffusion modeling.[3] In this way,

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traffic control devices, commuter taxes, gasoline rationing, or parking restrictions; and the imposition of emission charges or other economic incentives aimed at inducing parties to reduce their emissions voluntarily. Both the terms "emission limitations" and "emission standards" are used at various points throughout the 1970 Amendments. See, e.g., 42 U.S.C. §§ 1857c-6(a)(1), 1857c-6(d)(1), 1857c-7(b)(1), 1857h-2(a)(1), 1857c-5(a)(2)(B). *See* part IV-B *infra*.

The third term is "dispersion enhancement techniques". Dispersion enhancement techniques are devices which seek to reduce concentrations of pollutants not by reducing the amounts of pollutants emitted into the air, but rather by increasing the dispersion of pollutants throughout the atmosphere, so that pollutants are dispersed away from high-concentration areas and toward lower concentration areas. "Dispersion enhancement" techniques and "emission limitation" techniques thus constitute mutually exclusive categories. There are two major types of dispersion enhancement techniques. One, "intermittent" or "supplementary" control systems, involves staggering the hours of operation at industrial facilities which are major sources of pollution, so that the industries operate most extensively when meteorological conditions are favorable to dispersion, and curtail, or sometimes cease, operations when meteorological conditions do not favor dispersion. Another, at issue in this suit, involves the construction of high smokestacks at emission sources. The theory is that the higher the altitude at which pollutants are emitted, the more widely dispersed they will be.

On the range of "control strategies" that may be used in attaining the ambient standards, see Guidelines for the Preparation, Adoption and Submittal of Implementations Plans. 40 C.F.R. § 51.1(n) (1972).

[3] See generally S.Doc.No.91-63, at 100-03 (1970); Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on the Implementation of the

the emission standards and other "second phase" controls are derived from the ambient standards.

The Amendments divide responsibility for the establishment of these two sets of standards between the states and the federal government. The EPA has exclusive responsibility for establishing national ambient standards, while the states have primary authority, subject to EPA review, for establishing their own "implementation plans" to achieve those standards. The federal authority for promulgating ambient standards is established by 42 U.S.C. § 1857c-4(a). That provision requires the Administrator of the EPA to promulgate ambient air quality standards for all so-called "criteria pollutants" within 120 days from the enactment of the Amendments.[4] The Administrator is to establish two sets of ambient standards for each pollutant: "primary" standards,

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Clean Air Act Amendments of 1970, 92d Cong., 2d Sess., pt. 1 at 717 (1972); Note, The Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 Geo.L.J. 153, 160-61 (1972).

[4] "Criteria pollutants" are so called because they are pollutants for which the Administrator has issued "air quality criteria"—information about the extent and nature of the deleterious effects of the pollutant—under 42 U.S.C. § 1857c-3. Criteria pollutants are defined as those substances "ha[ving] an adverse effect on public welfare" and whose "presence . . . in the ambient air results from numerous or diverse mobile or stationary sources". *Id.* § 1857c-3(a)(1).

At present, there are six categories of "criteria pollutants": sulfur oxides; carbon monoxide; nitrogen dioxide; the hydrocarbons; particulate matter; and the photochemical oxidants. See 40 C.F.R. § 50 (1972).

"the attainment and maintenance of which . . . are requisite to protect the public health", 42 U.S.C. § 1857c-4(b)(1); and "secondary" standards "requisite to protect the public welfare from any known or anticipated adverse effects".[5] 42 U.S.C. § 1857c-4(b)(2).

The provision governing the adoption by the states and approval by the EPA of the state implementation plans is 42 U.S.C. § 1857c-5; and this long and detailed provision is the focus of our concern in this case. Under § 1857c-5, the states must prepare and submit implementation plans within nine months of the promulgation of the national ambient standards.[6] The Administrator then reviews the state plans to assure that they meet requirements established by the statute. The basic requirements are that the plans guarantee (1) the attainment of the national primary standards "as expeditiously as practicable", but in no case later than three years after the date of the approval of the plan,[7] and (2) the attainment

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[5] Language in a definitional provision of the statute explains the meaning of "effects on public welfare":

All language referring to effects on public welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

42 U.S.C. § 1857h(h).

[6] *Id.* § 1857c-5(a)(1).

[7] *Id.* § 1857c-5(a)(2)(A)(i).

of the secondary standards within a "reasonable time" to be specified by each plan.[8] Each plan must include "emission limitations, schedules, timetables for compliance with the limitations, and such other measures as may be necessary to insure attainment and maintenance" of the national standards.[9] Beyond these basic requirements, the provisions of § 1857c-5(a)(2)(C)-(H) set forth a number of other specific conditions a plan must meet before the Administrator may approve it. For instance, the plan must provide for monitoring and analyzing data on ambient air quality;[10] it must assure the funding and staffing of state agencies responsible for carrying out the plan;[11] and it must provide for periodic reports on the nature and quantity of emissions, and for making such reports public.[12] If the Administrator finds that a plan meets all of the statutory conditions, he must approve the plan within four months of the date of its submission.[13] If, on the other hand, he finds a plan or any portion of a plan does not satisfy any of the statutory conditions, he must disapprove that plan or portion. He is then directed to prepare and publish "promptly" his own implementation plan, or portion of a plan, for the state involved.[14] The Administrator must publish his substitute regulations within six

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[8] *Id.* § 1857c-5(a)(2)(A)(ii).

[9] *Id.* § 1857c-5(a)(2)(B).

[10] *Id.* § 1857c-5(a)(2)(C)(i).

[11] *Id.* § 1857c-5(a)(2)(F)(i).

[12] *Id.* § 1857c-5(a)(2)(F)(iii)-(iv).

[13] *Id.* § 1857c-5(a)(2).

[14] *Id.* § 1857c-5(c).

months of the date required for submission of the implementation plan in question.[15]

Subsections (e) and (f) of section 1857c-5 allow the Administrator to relax, in sharply limited circumstances, the requirements of section 1857c-5 or of any implementation plan promulgated under it. Subsection (e) allows the Administrator to extend the three-year deadline for meeting the national primary standards for up to two years, at the time the plan is submitted for approval. The Governor of the state involved must request the extension, and the Administrator must determine that the technology necessary to attain the standards is not then available, and that the state has taken or is planning to take all reasonably available control measures.[16] Subsection (f) provides a procedure for allowing particular sources to postpone the effective date of any requirement of any state plan after the plan has become effective. It requires that the Governor petition the Administrator for the postponement, and sets forth in detail the standards to be applied and procedures to be followed when petitions for postponements are brought.[17] Postponements may be granted for up to one year.

The Clean Air Act Amendments were enacted on December 31, 1970. Exactly 120 days later, on April 30, 1971, the EPA promulgated the national ambient standards for the six categories of "critera

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[15] *Id.*

[16] *Id.* § 1857c-5(e)(1).

[17] *Id.* § 1857c-5(f). This provision is quoted in full at note 29 *infra.*

pollutants".[18] See 40 C.F.R. § 50 (1972). On August 14, 1971, the Administrator adopted regulations to guide the states in the formulation and submission of their implementations plans. Requirements for the Preparation, Adoption and Submittal of Implementation Plans, 40 C.F.R. § 51 (1972). Implementation plans were due nine months from the date of the promulgation of the ambient standards, on January 31, 1972. Forty states met the deadline; the other states all filed their plans within a short time thereafter. The Administrator announced his actions on the various plans May 31, 1972. 37 Fed.Reg. 10842 et seq.

Georgia was one of the forty states to meet the January 31, 1972, deadline. The Administrator announced his action on the Georgia Plan in the regulations published May 31, 1972. The Administrator disapproved the plan in two respects not material here and approved all other portions of the Plan. 37 Fed.Reg. 10859, promulgating 40 C.F.R. § 52.572-4. The petitioners docketed this petition for review, under 42 U.S.C. § 1857h-5(b), within the 30-day period that provision allows.[19]

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[18] *See* note 4 *supra.*

[19] Section 1857h-5(b)(1) provides:

> A petition for review of the Administrator's action in aproving or promulgating any implementation plan under section 1857c-5 . . . or section 1857c-6(d) . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

II.

The petitioners' first objection concerns a Georgia statute requiring the agencies responsible for Georgia's air quality program to keep confidential "any information" they obtain relating to "secret processes, devices, or methods of manufacture or production".[20] Ga.Code Ann. § 88-908 (1971). The petitioners contend that the Administrator's approval of this provision was prohibited by 42 U.S.C. § 1857c-5(a)(2)(F)(iii), (iv). Those two clauses require that the state implementation plan provide "for periodic reports on the nature and amounts of [stationary source] emissions" from all sources covered by the plan, and "that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available . . . for public inspection".[21] The petitioners contend that Georgia's section 88-908 should have been disapproved because that statute, with its blanket protection of "any information" relating to trade secrets, would direct Georgia officials to block public access to emission data where such data could qualify as "trade secret" information, and that this violates section 1857c-5(a)(2)(F)(iii)-(iv).

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[20] Ga.Code Ann. § 88-908 provides in full:

> Any information relating to secret processes, devices, or methods of manufacture or production obtained by the board, department or their employees in the administration of this Act shall be kept confidential.

[21] See also 40 C.F.R. § 51.10(e)-.11(a)(6) (1972).

We agree. The public information and disclosure requirements of section 1857c-5(a)(2)(F)(iii)-(iv) have an important function under the 1970 Amendments. The Amendments embraced the concept of "citizen enforcement" of antipollution laws. 42 U.S.C. § 1857h-2 permits "any person" to bring a civil action in the federal district courts to enforce compliance with "any emission standard or limitation" promulgated under the Clean Air Act.[22] The public information requirements play a crucial role in assuring effective citizen enforcement. They are designed to ensure that "citizen enforcers" will have access to any and all information they will need in

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[22] Section 1857h-2(a) provides:

> (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—
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> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
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> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

prosecuting enforcement suits or in deciding whether to bring them.[23]

Georgia's section 88-908 would hamper the operation of the public information and disclosure requirements in Georgia. The statute directs officials to ignore their duty under the federal statute to assure the disclosure of *all* emission data if some emission data touches upon trade secrets. And the dictates of section 88-908 may be stern indeed, for a separate provision of the Georgia air pollution code threatens criminal penalties to an official who violates section 88-908.[24] In addition, section 88-908 could invite private parties to litigate questions whether emission data is "information relating to secret processes, devices, or methods of manufacture or production", and could thereby further impede the prompt and full disclosure of emission data.

In holding as we do, we are not insensitive to private interests in protecting confidential trade in-

[23] The connection between the information sections of the statute, section 1857c-5(a)(2)(F)(iii, iv) and Section 1857c-9(c), and the citizen enforcement provision is recognized in the legislative history of the Act. See S.Rep. No. 91-1196, at 38 (1970); Hearings Before the Subcomm. on Air and Water Pollution of the Comm. on Public Works, on S. 3229, S. 3466, S. 3546, 91st Cong., 2d Sess., at 828, 829-30 (statement of Professor James W. Jeans, Chairman of the American Trial Lawyers' Committee on Environmental Laws).

[24] Ga.Code Ann. § 88-916 (1971) provides that "any person who shall violate any of the provisions of . . . this Act" shall be guilty of a misdemeanor. The petitioners contend this provision could be read to impose penalties on Georgia officials who release emission information in violation of § 88-908.

formation. We view that interest, however, as subordinate to the public interest in full disclosure of emission data. This was the balance Congress itself struck in the 1970 Amendments. The Amendments provide for the confidentiality of trade secrets contained in information supplied to *federal* officials, but expressly state that emission data is not entitled to trade secret protection. See 42 U.S.C. § 1857c-9(c). The statute is not similarly explicit where information supplied to state officials is concerned, but there is no reason to strike the balance differently in that context.

The Administrator has himself disapproved provisions in fourteen state plans virtually indistinguishable from the provision in question here.[25] The EPA has presented no persuasive reason for distinguishing the situation here from the fourteen other situations in which the Administrator disapproved over inclusive confidentiality provisions.[26] We hold that this provision, like the fourteen others, violated section

[25] The fourteen were Delaware, the District of Columbia, Idaho, Iowa, Kansas, Kentucky, Missouri, Nebraska, New Jersey, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming. See 37 Fed. Reg. 10842 et seq. (May 31, 1972), announcing 40 C.F.R. § 52 (passim). See also Natural Resources Defense Council v. EPA, 1 Cir. 1973, 478 F.2d 875, 891-893 (invalidating Administrator's approval of a similar confidentiality provision in Massachusetts).

[26] The EPA attempts to defend the Administrator's action here, and to distinguish it from his action in the fourteen earlier instances, on the basis of two informal assurances EPA officials received from Georgia authorities. One came in a letter to the EPA dated May 4, 1972, from Robert H.

1857c-5(a)(2)(F)(iii), (iv), and should have been disapproved.

Accordingly, we order the Administrator to publish forthwith his disapproval of section 88-908.

III.

The second objection the petitioners raise concerns a Georgia statute authorizing Georgia officials to grant variances from requirements of the implementation plan. Ga.Code Ann. § 88-912 empowers the Georgia Department of Public Health to grant variances from "the particular requirements of any rule, regulation or general order" in a number of circumstances: if the Department finds that "strict compliance . . . is inappropriate because of conditions beyond the control of the . . . persons . . . granted such variances"; if it finds "special circumstances

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Collom, Jr., then Chief of the Air Quality Control Section of the Environmental Protection Division of Georgia's Department of Natural Resources; the other was conveyed in a telephone conversation, on November 16, 1971, between EPA attorneys and Mr. Robert Bomar, then a Georgia assistant attorney general. The EPA asserts that it was these two assurances which led the Administrator to conclude that 88-908 would never be applied to require that emission data be kept confidential.

We have examined the Collom letter and have considered the EPA's account of the Bomar telephone conversation, however, and we find it impossible to say that those two informal assurances provide an adequate basis for the conclusion the Administrator allegedly drew. Those assurances cannot dispel the reasonable fear voiced by the petitioners that section 88-908 may interfere with the purposes of § 1857c-5(a(2)(F)(iii), (iv).

which would render strict compliance unreasonable, unduly burdensome, or impractical"; if it finds that "strict compliance would result in substantial curtailment or closing down of . . . businesses, plants or operations". The statute specifies the procedures to be followed when variances are granted. A party seeking a variance must file a petition with the Director of the Department of Public Health, who makes an initial recommendation on the disposition of the petition. If his recommendation is against granting the variance, the Department must afford the party seeking the variance a hearing; if it is in favor of granting the variance, the Department must afford a hearing to any party aggrieved by the variance."[27]

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[27] The Georgia variance provision provides in full:

> The department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the department shall give

The petitioners' principal objection to this provision [28] is that it circumvents the provisions of 42 U.S.C. § 1857c-5(f), which, the petitioners argue, Congress intended to be the exclusive mechanism for

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consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the director of the department. The director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the director is for the granting of a variance, the department may do so without a hearing; Provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the department a written request for such notification.

Ga.Code Ann. § 88-912.

[28] The petitioners also object to the variance provision on the grounds (1) that it permits and directs Georgia officials to take into account economic and technical feasibility considerations to an impermissible extent; and (2) that it would undermine the state's legal authority to prevent the construction or modification of new stationary sources of emissions, in violation of 42 U.S.C. § 1857c-5(a)(2)(D), (a)(4). Because we hold the statute should not have been approved on the principal ground the petitioners advance, we have no occasion to address these contentions.

granting variances from requirements of state implementation plans. Section 1857c-5(f) speaks in terms of "postponements" of the effective dates of the requirements of implementation plans. It provides that "[p]rior to the date on which any stationary source . . . is required to comply with any requirement of an applicable implementation plan", the Administrator may grant a postponement of no more than one year of the effective date of the requirement. Section 1857c-5(f) requires that the Governor of the state apply to the Administrator for such a postponement. The substantive conditions of granting a section 1857c-5(f) postponement are strict. The Administrator must determine that "good faith efforts have been made to comply with such requirement"; that the source "is unable to comply . . . because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time"; that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health"; and that "the continued operation of such source is essential to national security or to the public health or welfare". 42 U.S.C. § 1857c-5(f)(1)(A)-(D). The section imposes procedural requirements for the granting of a postponement: affected parties must be afforded an opportunity to be heard; the Administrator must make a statement of his findings and

conclusions, and judicial review is provided in the appropriate circuit courts of appeals."

[20] 42 U.S.C. § 1857c-5(f) provides in full:

"(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

"(A) good faith efforts have been made to comply with such requirement before such date,

"(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

"(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

"(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

"(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

"(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days

are far more restrictive than the counterpart standards and procedures of Georgia's section 88-912. The petitioners argue that the restrictiveness of section 1857c-5(f) was deliberate on the part of Congress and that the section was intended to apply to all requests to change the application of particular requirements of state implementation plans after the adoption of the plans. They contend therefore that the Georgia provision is an impermissible attempt to frustrate the will of Congress.

from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

"(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

"(D) Section 307(a) (relating to subpenas) shall be applicable to any proceeding under this subsection."

The EPA takes a different view of section 1857c-5(f). The Agency argues that the standards and procedures of that section are intended to apply only when the source in question is so large or has such serious effects that granting a postponement to that individual source will, by itself, threaten the attainment of a national ambient air standard. In other situations, the EPA argues, the states have power to grant variances under section 1857c-5(a)(3), which provides for "revisions" by the states of their implementation plans, subject to EPA review to determine whether the plan as revised still meets all the requirements of the statute.[30] The Administrator's theory is that each time a state grants an individual variance not sufficient to threaten attainment or maintenance of a national standard, it is merely "revising" its implementation plan. The Administrator has embodied this view of section 1857c-5(f) and of the "revision" authority of section 1857c-5(a)(3) in his Guidelines for the Preparation, Adoption, and Submittal of Implementation Plans. See 40 C.F.R. § 51.15(d), -.32 (1972).[31]

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[30] 42 U.S.C. § 1857c-5(a)(3) provides in full:

> "(3) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements, of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."

[31] The Administrator's basic position is stated by 40 C.F.R. § 51.32(f):

> A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in the plan: *Provided, however,* that any such determination will be deemed a revision of an applicable plan under § 51.6

40 C.F.R. § 51.15(d) provides further:

> Except as otherwise provided by Subpart C of this part, neither the State agency nor a local agency shall grant any variance of, or exception to, any compliance schedule included in an applicable plan if such variance or exception will prevent, or interfere with, attainment or maintenance of a national standard within the time(s) specified pursuant to § 51.10(b) and (c).

We cannot accept the Administrator's reading of the statute. Nothing in the statute supports the limitation of section 1857c-5(f) to situations involving sources so large that a single variance granted it threatens the attainment of a national ambient standard. Section 1857c-5(f) speaks in terms of "*any* stationary source", and of the postponement of "*any* requirement of an applicable implementation plan". This language is not ambiguous and lends no basis for the construction the Administrator has given it. Nor does the revision authority of section 1857c-5(a)(3) lend any aid to the Agency's argument. A revision is a change in a generally applicable requirement; a postponement or variance a change in the application of a requirement to a particular party. The distinction between the two is familiar and clear. It is equally clear that it was this distinction Congress had in mind when it simultaneously adopted section 1857c-5(f) and section 1857c-5(a)(3)—the proce-

dures of section 1857c-5(f) were to apply to *all* particular changes, and those of section 1857c-5(a)(3) to changes in rules of general application. There is no reason to believe that Congress intended that some, indeed most, changes of a particular character should be deemed "revisions" for the purposes of choosing a procedure for approving it.

Our conclusion is fortified by our view of the overall scheme of the Clean Air Act Amendments. The approach of the Amendments, as one commentator has expressed it, was to shift from the approach of earlier legislation of "establishing air pollution standards commensurate with existing technological feasibility" to a bolder "policy which forces technology to catch up with the newly promulgated standards". Note, The Clean Air Amendments of 1970: Better Automotive Ideas from Congress, 12 B.C.Ind. & Comm.L.Rev. 571, 581 (1971). As Senator Muskie, the Senate sponsor of the Amendments, put it:

> The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong.Rec. 16091 (daily ed. Sept. 21, 1970), quoted at Note, *supra*, at 581. In a statute that constituted a "challenge to do what seem[ed] impossible", seeking to "forc[e] technology to catch up with the newly promulgated standards", it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.

Section 1857c-5(f) is the device Congress chose to assure this. Congress aimed to make "variances", "postponements", or whatever departures from earlier commitments might be called, unusual and difficult to obtain. That is why Congress required applications for them to be made by the governors of the states, thus ensuring an initial screening of applications by high-level state officials. And that is why Congress imposed rigorous substantive conditions on the granting of variances, allowing them only when the unavailability of technology made compliance impossible, when continued operation of the source was essential to national security, public health, or public welfare, and when all available alternative control measures had been taken. Georgia's statute, allowing variances whenever a state official finds compliance would be "unduly burdensome", "unreasonable", or "inappropriate", or when he finds that compliance would require the closing of *any* source—whether or not the source is necessary to the public health or welfare or to national security—would be wholly inadequate to fulfill the part Congress planned for the federal post-

ponement provision, section 1857c-5(f), to play in the general strategy of the Clean Air Act Amendments.

The EPA advances an alternative to the theory based on the "revision" authority of section 1857c-5(a)(3) as a ground on which it suggests we may uphold, at least in part, the Administrator's approval of Section 88-912. The EPA suggests that, even if we hold that the state variance procedure is impermissible in the period *after* the date set for the initial attainment of the national ambient air standards (in mid-1975, for the primary standards), we might still approve the use of state variance procedures during the period preceding these dates. This suggestion derives from the decision of the First Circuit in a case involving a challenge, also mounted by the Natural Resources Defense Council, to the Administrator's approval of the Massachusetts and Rhode Island state plans. Natural Resources Defense Council v. EPA, 1 Cir. 1973, 478 F.2d 875.[32]

In that case, the Administrator had approved variance provisions in both the Massachusetts and Rhode Island plans very much like the variance provisions included in the Georgia Plan. In response to the NRDC's challenge to both states' provisions, 478 F.2d at 884-888, 891, the First Circuit held that state variance procedures could not be employed during what it labelled the "post-attainment period", be-

[32] The view of the First Circuit was followed recently by the Eighth Circuit in deciding the NRDC's challenge to the Iowa state plan. Natural Resources Defense Council v. EPA, 8 Cir. 1973, 483 F.2d 690, 693-694.

cause it concluded that Congress intended that section 1857c-5(f) should provide the exclusive mechanism for altering the application of requirements of implementation plans over the long run, 478 F.2d at 887, expressly rejecting the theory based on the "revision" authority of section 1857c-5(a)(3). But the court allowed the use of state variance procedures during what it called the "pre-attainment period". Its rationale for this holding was its conclusion that the statute "anticipates greater flexibility during the pre-attainment period". It said:

> We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

478 F.2d at 887.

We are unable to agree that the statute envisions granting the states the kind of "flexibility" during the "pre-attainment period" which provisions like Georgia's section 88-912 would afford. The parts of the statute on which the First Circuit relied were the provision of section 1857c-5(a)(2)(A)(i) that primary standards had to be met, not immediately, but only "as expeditiously as practicable", but in no case later than three years from the adoption of the state plan, and the provision of section 1857c-5(e) for a possible two-year extension of the deadline in sharply

restricted circumstances. The First Circuit said that "[t]he provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement of *standards*". 478 F.2d at 887 (emphasis supplied).

This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived. We think that the provisions of section 1857c-5(a)(2)(A)(i) and section 1857c-5(e) do not provide *any* support for the latter conclusion. Nor do we find any support for that conclusion anywhere in the statute. Instead we find that the statute as a whole supports the general view of its overall strategy we articulated above: that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need. That view precludes the conclusion that Congress intended the states to have the kind of "flexibility" state variance plans would give them.

Thus we hold that it was inconsistent with the statute for Georgia to adopt its own variance procedures, and that the Administrator exceeded his authority in approving section 88-912. Accordingly, we direct the Administrator to publish forthwith his disapproval of section 88-912.

IV.

The third objection the petitioners raise concerns Georgia's "control strategy" for meeting the national ambient air quality standards for particulate matter and sulfur dioxide.[33] Georgia's implementation plan, as submitted to the Administrator and approved by him in May 1972, made the permissible amounts of particulates and sulfur dioxide emissions dependent on the heights of the smokestacks at the sources; the higher its smokestacks, the more a source was permitted to emit. Georgia Rules and Regulations for Air Quality Control § 270-5-24-.02 (2)(g) (SO_2),-(m) (particulates). This "tall stack" approach represents a form of "dispersion enhancement technique". Dispersion enhancement techniques are techniques to reduce concentrations of pollutants not by reducing the quantities emitted into the air—the objective of so-called "emission limitation" techniques—but rather by altering the conditions under

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[33] For the definition of the term "control strategy", and some examples of alternative "control strategies", see the Guidelines for the Preparation, Adoption and Submittal of Implementation Plans, 40 C.F.R. § 51.1(n) (1972).

which substances are emitted, in order to enhance their dispersion throughout the atmosphere."[34]

The petitioners contend that Georgia's choice of such a strategy is in conflict with 42 U.S.C. § 1857c-5(a)(2)(B). That subparagraph requires that state implementation plans "includ[e] emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard". The petitioners contend that the directive to use "emission limitations", coupled with the reference to "other measures . . . *necessary*", means that "other measures", including any and all dispersion techniques,[35] may be employed only when "necessary" in the sense that all available emission limitation has been first achieved. And they suggest that Georgia had not adopted controls capable of achieving the maximum possible emission limitation before it adopted the tall stack controls.

The Agency raises a threshold issue, however, which we must decide before we may consider the merits of this objection. During oral argument in this case, on May 9, 1973, counsel for the EPA informed the Court that two days earlier the Agency had advised Georgia that it no longer considered the regulations setting forth the tall stack controls "valid

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[34] *See* note 2 *supra*.

[35] Dispersion enhancement techniques and emission limitation techniques are, in the sense in which we use the terms, mutually exclusive categories. *See* note 2 *supra*.

control techniques" under section 1857c-5(a)(2)(B). The Agency argued that this action mooted the petitioners' third objection. After argument, the EPA filed with this Court a copy of the letter by which the Agency had informed Georgia of its decision. This is a letter, dated May 7, 1973, from Mr. Jack E. Rayan, the EPA Regional Administrator, to Governor Jimmy Carter of Georgia.

We thus first address the question whether the action announced in the May 7 letter to Governor Carter moots the issue otherwise before the Court.

A.

The relevant portion of the EPA's letter to Governor Carter is this:

> On May 31, 1972, the Administrator of the Environmental Protection Agency approved the Georgia Implementation Plan control strategy for attainment of the National Standards for particulates and sulfur dioxide. Further analysis by the Environmental Protection Agency has shown that the control strategy for attainment and maintenance of standards *allows the application of regulations* (GA. Regs. 270-5-24-.02-(2)-(g) and 270-5-24-.02-(2)-(m) *which permit unrestricted increases in stack height through-*[*out*] *the State* as a means of compliance. It is the determination of the Environmental Protection Agency that these regulations are not valid control techniques under Section [1857c-5(a)(2)(B)] of the Clean Air Act.

> Therefore, as required by Section [1857c-5(a)(2)(H)(ii)] of the Clean Air Act, Georgia must revise its Plan by deleting the above cited regulations and submitting a substitute control strategy.

(Emphasis supplied).

The petitioners argue that the action announced in this letter fails to moot their third objection, because that action stops short of rejecting altogether Georgia's dispersion enhancement control strategy. They focus upon the passage we italicized in the letter. They point out that in the letter the EPA merely disapproved the *particular regulations* Georgia adopted, and not the entire idea of a dispersion enhancement control strategy. And they note that the vice of the regulations identified by the letter is *not* that the strategy they embody relies upon tall stacks, or that it relies upon dispersion enhancement, but merely that the regulations permitted *unrestricted* increases in stack height *throughout the state*. Thus, they argue, their dispute with the EPA over whether Georgia may employ a tall stack strategy is still a live one.

We agree. It has become manifest since the letter was sent to Governor Carter, that the EPA's objection to Georgia's regulations was not to their fundamental approach, but merely to their excessive breadth. The EPA on September 14, 1973, published proposed amendments to its Guidelines on the Preparation, Adoption and Submittal of Implementation Plans. These amendments include a proposed regula-

tion to govern the use of tall stacks for controlling sulfur dioxide and particulate matter pollution. 38 Fed.Reg. 25701, proposing 40 C.F.R. § 51.13(h). This regulation would generally allow the use of stack height increases to control pollution only up to "height[s] consistent with good engineering practice". However, large, isolated pollution sources would be allowed to undertake larger increases, provided that at the same time they were subjected to a more general set of dispersion-enhancing controls.[36]

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[36] The EPA's proposed regulation provides in full:

> (h) The increase of stack height up to a height consistent with good engineering practice is acceptable without qualification. An increase in stack height beyond this level is not an acceptable air quality control procedure unless accomplished as part of an approved supplementary control system (see Appendix P to this part). A stack which conforms to good engineering practice is sufficiently tall that emissions from the stack are unaffected by the atmospheric downwash, eddies and wakes which may be created by the facility itself, nearby structures or terrain obstacles. Emissions from facilities with stacks which do not conform to good engineering practice often cause excessively high ground-level concentrations and nuisances within and in the vicinity of the facility itself. For fairly level terrain, good engineering practice is normally taken to be a stack height 2½-times the height of the facility or nearby structure. For complex terrain, the 2½-times rule-of-thumb is too simplistic. For such cases, and for more detailed information on good engineering practices, the references listed should be consulted.

37 Fed.Reg. 25701 (September 14, 1973), proposing 40 C.F.R. § 51.13(h).

This regulation would not by its own terms limit the use of unrestricted height increases to isolated sources; but that

This proposal makes it clear that the EPA's objection to Georgia's regulation is what the petitioners argue it to be: that the regulations permit unrestricted increases anywhere in the state, and not that they rely upon a dispersion control strategy. The regulations permit the use of stack height increases up to the point consistent with good engineering practice as a control strategy. And they permit the use of unrestricted stack height increases in prescribed circumstances for large, isolated sources. They do not reject the idea of a tall stack control strategy; and they certainly do not reject the more general idea of a dispersion enhancement strategy. Implicit in the Agency's statement that the regulations are faulty because they "permi[t] unrestricted stack height increases though[out] the state" is the message that the Agency would approve a more limited use of a tall stack strategy; and the proposed regulations make it clearer that this was and is the Agency's position. Thus, the EPA's position is still considerably at odds with the position taken by the petitioners.

An additional consideration leads us to decide the mootness question as we do. This is the need for

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limitation is implied in the limitation to situations where stack height increases are part of "an approved supplementary control system", since other parts of the regulations limit the use of supplementary control systems to large, isolated sources. "Supplementary control systems" refer to systems whereby industrial operations are staggered according to meteorological conditions in order to enhance dispersion, described briefly in note 2 *supra*.

expedition in finally settling on a control strategy for Georgia for combatting sulfur dioxide and particulate matter pollution. Months have elapsed since the EPA first notified Georgia of the withdrawal of approval of the tall stack regulations. Neither Georgia nor the Administrator has come forward with a proposed alternative to the tall stack regulations.[37] Georgia does have other regulations aimed at controlling sulfur dioxide and particulate emissions,[38] but the EPA has not argued here that these regulations are by themselves sufficient to assure attainment of the national ambient standards for particulates and sulfur dioxide.[39] Over half of the three year period allowed for the attainment of the primary standards has elapsed; and we see little to be gained by waiting further to see whether the Administrator will approve a substitute for the Georgia regulations disapproved last May.

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[37] The Administrator of the EPA is empowered to publish his own regulations if a state fails to revise its plan after having been notified by the Administrator of the need to do so. 42 U.S.C. § 1857c-5(c)(3).

[38] Ga.Rules and Regulations for Air Quality Control § 270-5-24.02(2)(d)-(e). Those provisions are described more fully in part IV-C.

[39] See also note 51 *infra*.

B.

42 U.S.C. § 1857c-5(a)(2)(B) provides:

> The Administrator shall approve such [state implementation] plan, or any portion thereof, if he determines that . . .
>
> • • • •
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> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls.

The issue before this Court, in interpreting this provision, is well framed in an EPA staff paper, now published in the Congressional Record. In framing the issue, we take the liberty of quoting at length from that paper:

> It should be clear . . . that the intent of Congress in the Clean Air Act is that the State Implementation Plans must include emission limitations. It is also clear that the words "and such other measures as may be necessary" exclude the interpretation that emission reduction is the only acceptable means of meeting [national ambient air quality standards]. Between these two boundaries to interpretation there is a broad, unexplored territory.
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> • • • •
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> There are two basic approaches to this legally unexplored territory. The first approach, which may be called the broad approach, views the

> [Act] in its entirety. . . . When [section 1857c-5(a)(2)(B)] is read in . . . light [of other provisions of the Act] emission reduction is clearly the preferred control method, and "such other measures" are allowed only if emission reduction sufficient to meet [the national standards] in the time specified (3 years) i[s] unavailable or infeasible—or, in the words of the Act, only if they are "necessary."
>
> The second interpretation, which may be called the narrow approach, focuses on the objective of [section 1857c-5(a)(2)(B)] rather than the means of attaining that objective. The principal objective of [a state implementation plan] is that it meet primary and secondary standards by the appropriate deadline. Several means have been *suggested*, including emission limitation, land use, and transportation controls, but Congress was careful to add "such other measures" and "but not limited to." Thus, *any* means may be employed provided the ends are attained.

Monitoring and Data Analysis Division, Office of Air Quality Planning and Standards, Office of Air and Water Pollution, Environmental Protection Agency, Staff Paper—Intermittent Control Systems, 119 Cong.Rec. 10948, 10955-56 (daily ed. June 12, 1973) (emphasis in original).

We take the "broad approach" described in the quoted passage. We believe that approach reflects the intent of Congress in adopting section 1857c-5(a)(2)(B). Two major considerations underlie our conclusion.

First, we find that other provisions of the 1970

Amendments indicate that Congress intended in section 1857c-5(a)(2)(B) to require maximum use of emission standards. Some sections show a general preference on the part of Congress for emission standards; others show an understanding by Congress that the requirements of implementation plans would consist primarily of emission standards.

The sections exhibiting Congress's preference for emission standards are sections 1857c-6(a)(1) and 1857c-7(b)(1)(B). Those sections provide, respectively, for the establishment of federal emission standards for new sources (section 1857c-6(a)(1)) and for emissions of hazardous air pollutants (section 1857c-7(b)(1)(B).[40] Both sections make clear that

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[40] "Hazardous air pollutants" are defined by the statute as substances "to which no ambient air quality standard is applicable and which . . . may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illess". 42 U.S.C. § 1857c-7(a)(1). Compare the definition of criteria pollutants quoted at note 4 *supra*.

Under the Amendments, emissions of hazardous air pollutants from any source, and all emissions from new stationary sources, are to be regulated wholly by *federal emission* standards. In these two contexts, the statute abandons the "two-phase" approach to standard-setting adopted by sections 1857c-3-5 for the control of emissions of the major "criteria" pollutants from existing stationary sources; no ambient standards are set or employed, and reliance is placed instead entirely upon emission standards. The emission standards for new sources are standards "which reflec[t] the [best] degree of emission limitation achievable through the application of the best system of emission reduction" which has been adequately demonstrated, § 1857c-6(a)(1), (b)(1)(B); the standards for hazardous pollutants are stand-

the Administrator is to establish *emission standards;* they do not contemplate control of pollution from new sources or of hazardous pollutants by dispersion techniques, or by any other techniques besides emission limitation. See also *EPA Staff Paper, supra,* 119 Cong.Rec. at 10955 (daily ed. June 12, 1973).

Sections 1857c-6(d)(1) and 1857h-2(a)(1) exhibit a congressional understanding that implementation plans would generally rely upon emission limitations. Section 1857c-6(d)(1) requires the states to promulgate supplementary implementation plans establishing standards for the emissions from existing sources of "non-criteria pollutants" when emissions of those substances from new sources are regulated by federal standards adopted under section 1857c-6(a)-(b). It states that *emission standards* are to be established, and it says they shall be established by "a procedure similar to that provided by section 1857c-5". The EPA's staff paper aptly states why this implies emission standards are required under section 1857c-5(a)(2)(B):

> This section requires *emission* standards for *existing* sources of non-criteria pollutants established "by a procedure similar to that provided under [section 1857c-5]." This clearly implies that *emission* standards are required under Section [1857c-5]. This implication is made not only by the plain language of the Act,

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ards "which in [the Administrator's] judgment provid[e] an ample margin of safety to protect the public health from such hazardous air pollutant". § 1857c-7(b)(1)(B).

> but also on equity grounds. Why should *emission* standards be required of *existing* sources of non-criteria pollutants when such *emission* standards are not required for criteria pollutants? When Section [1857c-5(a)(B)] is read in this light, emission reduction is clearly the preferred control method, and "such other measures" are allowed only if emission reduction sufficient to [the national standards] in the time specified (3 years) i[s] unavailable or infeasible—or, in the words of the Act, only if they are "necessary".

EPA Staff Paper, supra, 119 Cong.Rec. at 10955-56.

But the provision we think most important to note in this context is Section 1857h-2(a)(1), the citizen enforcement provision. That paragraph provides:

> (a) Except as provided in subsection
>
> (b) any person may commence a civil action in his own behalf—
>
> (1) against any person . . . who is alleged to be in violation of (A) an *emission standard or limitation* under this act or (B) an order issued by the Administrator or a State with respect to such *standard or limitation.*

(Emphasis supplied). We find in this section powerful evidence that Congress intended that the requirements of implementation plans would whenever possible be emission limitations. If, as the "narrow approach" implies, the states may treat emission limitation and dispersion enhancement simply as alternative "means" of attaining the "objective" of meeting the national standards, then the states, with

EPA approval, may choose requirements citizen enforcers are not empowered to enforce over requirements they would be empowered to enforce. We cannot believe Congress intended such a result. Citizen enforcers were supposed to be the watchdogs of the public enforcers, the EPA and the states. We cannot believe Congress would have afforded the states and the EPA a means by which they could unilaterally curtail the scope of their watchdogs' surveillance. This provision, too, evinces a congressional understanding that section 1857c-5(a)(2)(B) requires maximum use of emission standards and limitations.

The second consideration supporting our view of Congress's intent is the Clean Air Act's so-called policy of "nondegradation". This policy holds that areas of clean air—areas where the air quality indices read above the levels set by the national standards—must not be degraded, even though degradation will not reduce the quality of the air below the levels specified by the standards. The Act does not anywhere expressly adopt a nondegradation policy; but there is abundant evidence that nondegradation is an important goal of the Act. That evidence has been marshalled elsewhere. Sierra Club v. Ruckelshaus, D.C.D.C.1972, 344 F.Supp. 253, 255. We need do no more here than gather it in the margins.[41] By

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[41] The principal textual basis of the policy is contained in the Act's statement of purposes. Section 1857(b)(1) announces that a purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare". An administrative regulation under the 1967 Amendments to the Act, pub-

now the most important authority recognizing nondegradation as a policy of the Act is the Sierra Club

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lished by the Department of Health, Education, and Welfare, the agency which at that time was responsible for the administration of the Act, was the first to recognize that the "protect and enhance" language implied a nondegradation policy:

> [A]n explicit purpose of the Act is "to *protect* and *enhance* the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality region clearly would conflict with this expressed purpose of the law.

National Air Pollution Control Administration, U.S. Department of Health, Education, and Welfare, Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I § 1.51, at 7 (1969).

The legislative history of the 1970 Amendments abundantly demonstrates that the position taken in the old HEW regulations was valid and that it would remain so under the 1970 Amendments. Both then Secretary of HEW Finch and his Undersecretary Veneman testified that nondegradation was and would be a policy of the Clean Air Act during the 1970 hearings on the Amendments. Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on S. 3229, S. 3466, S. 3546, 91st Cong., 2d Sess. at 132-33, 143 (1970); Hearings on Air Pollution and Solid Waste Recycling Before the Subcomm. on Public Health and Welfare of the House Interstate and Foreign Commerce Comm., 91st Cong., 2d Sess. at 280, 287 (1970). More important, the Senate Report on the Amendments openly and unequivocally embraced the nondegradation policy:

> In areas where current air pollution levels are already equal to or better than the air quality goals, the Secretary shall not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.

S.Rep.No.91-1196 at 2 (1970). The House Report implies the same thing. H.R.Rep.No.91-1146 at 1, 2, 5 (1970).

decision, affirmed by an equally divided Supreme Court. See Fri v. Sierra Club, 1973, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140.

The use of dispersion techniques is at odds with the nondegradation policy. Dispersion enhancement techniques operate by keeping pollutants out of areas of high pollutant concentration, and dispersing them to lower concentration areas; their objective is to reduce concentrations in high-concentration areas. Inevitably, however, the pollutants emitted into the atmosphere must end up somewhere; and the atmosphere at their destination, wherever that may be, will be degraded, in violation of the congressional policy. The only techniques fully capable of guaranteeing nondegradation are emission limitation techniques.

Our conclusion as to the Congressional objective in enacting section 1857c-5(a)(2)(B) draws further support from two items in the legislative history of the Amendments. The first and most important is that Congress chose the language of this section over language that would clearly have allowed alternatives to emission limitations to be used. The Administration and House bills in 1970 allowed the approval of a state plan if it included "emission standards, *or equivalent measures*, and such other measures as may be necessary to achieving or preserving" the national standards. S. 3466, § 7(c)(1)(C)(i). The second is a statement by Senator Muskie during the debates on the Amendments:

> In order to implement the national ambient air quality standards, these [state implementation]

> plans must provide for emission limitations on all sources in the region covered by the plan . . .

116 Cong.Rec. 42384 (Dec. 18, 1970).

Our conclusion that the "broad approach" to section 1857c-5(a)(2)(B) accurately reflects the statutory intent does not end the question, however. For the EPA's defense of Georgia's "tall stack" strategy does not rest entirely, or even primarily, on the so-called "narrow approach". It rests, instead, upon the fact that Georgia has regulations apart from the "tall stack" regulations which impose limits on the emissions of sulfur dioxide and particulate matter. Responding to this argument requires that we first discuss briefly what the regulations on which the EPA relies provide.

C.

As submitted to the Administrator in 1972, the Georgia Rules and Regulations for Air Quality Control stipulated three separate quantitative limitations on emissions of particulate matter. One quantitative limit applied only to manufacturing sources;[42] a second applied only to fuel-burning sources.[43] The third limit, applicable to all sources, was expressed as a function of stack height; the regulation containing this limit was one of the two disapproved by the EPA

[42] Georgia Rules and Regulations for Air Quality Control § 270-5-24-.02(2)(e).

[43] *Id.* § 270-5-24-.02(2)(d).

in May 1973.[44] The two limits were cumulative, so that the effective limit for any given source was the lower of the two limitations applicable to it.[45]

The Georgia Regulations imposed only one express quantitative limit on the permissible level of sulfur dioxide emissions; this was the limitation, now disapproved, expressed in terms of stack height.[46] But Georgia also had a regulation, still effective today, limiting the permissible sulfur content of the fuel fuel-burning sources may use.[47] The aim and effect of this provision was to limit sulfur dioxide emissions; so the regulation is an "emission limitation", in the broad sense of the term.[48] Since fuel-burning sources are virtually the only sources of sulfur dioxide emissions in Georgia,[49] Georgia does have an "emission limiting" regulation applicable to every source of sulfur dioxide in the state.

[44] *Id.* § 270-5-24-.02(2)(m).

[45] Air Quality Control Branch, Georgia Department of Public Health, Implementation Plan for Attainment of State and National Ambient Standards at 91 (1972) [hereinafter cited as Georgia State Plan]; Record at 340.

[46] Georgia Rules and Regulations for Air Quality Control § 270-5-24-.02(2)(g)(1).

[47] *Id.* § 270-5-24-.02(2)(g)(3).

[48] *See* note 2 *supra*.

[49] The EPA asserted before us that sulfuric acid plants used the only manufacturing process in Georgia which was a source of sulfur dioxide emissions. The petitioners did not contest the assertion, and we accept it as true. A special section of the Georgia regulations imposes a special limit on SO_2 emissions from sulfuric acid plants. Georgia Regulations § 270-5-24-.02(2)(j).

The EPA's primary argument rests upon the limitations on sulfur dioxide and particulate emissions that are not related to stack height. The EPA notes (1) that the Georgia Plan, as initially approved, contained an "emission limiting" regulation applicable to every source in the state; and (2) that the Plan as approved guaranteed attainment and maintenance of the national ambient standards for particulates and sulfur dioxide. This, the EPA argues, should be sufficient to satisfy any requirement that plans include "emission limitations" section 1857c-5(a)(2)(B) may impose.

The EPA's argument mistakes the nature of the "broad approach" to section 1857c-5(a)(2)(B). That provision is not satisfied merely because a state plan includes a stated emission limitation applicable to every source in the state, and also, with the help of dispersion techniques, guarantees attainment of the national standards.[50] The "broad approach"—as ex-

[50] If this were sufficient to satisfy the requirement of section 1857c-5(a)(2)(B), that requirement could be easily evaded. A state desiring to rely on a dispersion "control strategy" could simply include in its plan a regulation stating a quantitative limit on emissions so high that no source would ever need be concerned about it. The state would in effect be relying entirely upon its dispersion regulations to meet the standards; but its plan would contain an emission limitation formally applicable to every source in the state.

If this possibility seems far-fetched, it nonetheless serves to emphasize the fact that in enforcing the requirement of section 1857c-5(a)(2)(B), where a state plan includes both emission limitations and dispersion enhancement controls, a reviewing court must scrutinize the emission limitations included in the plan to determine the relative degrees of reliance

pressed by the EPA's own staff paper—demands something more. It allows dispersion techniques to be used only if there is a demonstration that "emission reduction sufficient to meet [the national standards] in the time specified (3 years) is unavailable or infeasible—or, in the words of the Act—only if they are 'necessary.'" EPA Staff Paper, *supra*, 119 Cong. Rec. at 10955.

This standard implies that a control strategy such as Georgia's tall stack strategy may be included in a state's plan only under one of two conditions. It may be included only (1) if it is demonstrated that emission limitation regulations included in the plan are sufficient *standing alone*, without the dispersion strategy, to attain the standards; or (2) if it is demonstrated that emission limitation sufficient to meet the standard is unachievable or infeasible, and that the state has adopted regulations which will attain the maximum degree of emission limitation achievable.

The EPA has never suggested that Georgia can meet the second of these conditions; it has, however, hinted that Georgia's emission limitation regulations may be sufficient by themselves to attain the standards. However, the record before us is unclear on

the state plan places upon emission limitation and dispersion enhancement. Once that fact is recognized, the only question is what the objective of such scrutiny should be; and, in our view, the implication of the so-called "broad approach" to section 1857c-5(a)(2)(B) is that the objective should be to determine whether the reliance placed upon emission limitation is as great as possible.

that question. There are indications in the Georgia plan that the tall stack control strategy was a crucial part of the state's program for attaining the standards.[51] We are unable at this time and on this record to make a judgment as to whether the emission limitations in the Georgia plan will be sufficient to attain the national standards. More important, however, it would be inappropriate for us to make such a judgment, for it appears to us that the Administrator himself has never formally determined whether those requirements are independently sufficient to guarantee attainment of the national standards. All the Administrator determined in May 1972 was that the Plan, with the *combination* of those regulations

[51] With respect to particulates, the Plan states:

> The stack height limitation prevents large sources, even though they meet the requirement based on heat input or process weight rater, from releasing large quantities of particulates from short stacks and thereby causing the ambient standard to be exceeded.

Georgia Plan at 91; Record at 340. With respect to sulfur dioxide, the Plan seems to indicate fairly clearly that the stack-height regulations were adopted as a substitute for available emission reduction devices:

> Since the economics and efficiency of SO_2 removal equipment are uncertain at this time, no boiler curve or process weight rater formula were adopted for existing sources. The stack height formula for SO_2 emissions does insure that ambient conditions will not exceed the air quality standards, by requiring restrictions on emissions from stacks which are too short for the amount of SO_2 emitted. If a source is in excess of the emissions allowed by the stack height formula then the options of SO_2 removal or stack height extension are available.

Id.

and the tall stack regulations, would guarantee attainment of the standards; all he determined in May 1973 was that the tall stack regulations were inappropriate under the Agency's then emerging policy on dispersion enhancement techniques.

Under our holding, however, an explicit determination of this matter by the Administrator is a crucial first step in disposing of the petitioners' third objection. Accordingly, the first step in fashioning an order to dispose of that objection is to order the Administrator to make an explicit determination on this question. The Administrator should make this determination as promptly as is administratively feasible.

If the Administrator determines that the regulations are sufficient to assure attainment, he shall file with this Court a short statement of his conclusions and the grounds for it. The petitioners should respond promptly to such a filing by the Administrator. If the Administrator determines that the regulations are not independently sufficient to assure attainment, then it will be his duty to promulgate regulations which do assure attainment of the standards. If the Administrator does determine the existing regulations are insufficient to assure attainment, he should promptly notify the Court of his determination. When and if the Administrator does make such a determination, we shall consider issuing further guidelines in accordance with this opinion to govern the process of preparing and publishing substitute regulations specifying a control strategy for particulates and sulfur dioxide in Georgia.

V.

The petitioners' final challenge is to the Administrator's approval of portions of section 88-906 of the Georgia Code. That provision, entitled "Factors to be considered in exercising powers and responsibilities related to air quality", sets out a list of factors the Board of Health and Department of Public Health are to consider in exercising their responsibilities under the Georgia air quality code. The petitioners object to the inclusion of five of these factors. These are:

> (h). The availability of air-cleaning devices
>
> (i). Economic feasibility of air-cleaning devices
>
> * * * *
>
> (k). Effect on efficiency of industrial operations from use of air-cleaning devices
>
> * * * *
>
> (o). The economic and industrial development of the State and the social and economic value of the source of air contaminants
>
> (q). Other factors which the Department may find applicable.

The petitioners contend that the inclusion of these factors in the list undermines the intent of Congress that considerations of public health should always take precedence over considerations of economic impact or technical feasibility under the Clean Air Act.

We agree that the Administrator's approval of the challenged portions of this Georgia statute violated the Amendments. The statute implies that considera-

tion of economic factors be limited in two respects. First, Congress made it clear that considerations of economic cost or technical feasibility were *always* to be subordinate to considerations of public health. Second, and as a corollary to this, Congress made it clear that cost and feasibility were not to be considered in meeting the three-year deadlines for attaining national primary standards. Those standards are set in terms of what is required for the protection of public health.

The legislative history of the Amendments, fortified by statements made by some of the draftsmen of the Amendments since the enactment of the Amendments, supports this conclusion. The House version of the Amendments included the phrase "giving due consideration to the economic and technological feasibility of compliance". The phrase was removed in the House-Senate Conference, after what Senator Thomas F. Eagleton remembers as "hours" of debate.[52] The Senate Report on the Amendments states

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[52] Senator Eagleton stated in February 1972:

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as, "Giving due consideration to economic and technological feasibility of compliance." That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

[Footnote continued on page 50a]

the essential position of the Amendments with respect to cost and feasibility factors:

The Committee determined that 1) the health of the people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and 2) the growth of the pollution load in many areas, even with the application of available technology, would be deleterious to public health. Therefore, the Committee determined that existing sources of pollutants should meet the standard of law or be closed down. . . . S.Rep. No. 91-1196 at 2-3 (1970). The Senate Subcommittee on Air and Water Pollution, which had been responsible for drafting the Senate version of the Amendments, sent a briefing paper to the Administrator in early 1972. In that paper, the Subcommittee stated its understanding of the matter:

> Inclusion of a test of social and economic feasibility of compliance with those control requirements necessary to achieve protection of public health as part of implementation plan guidelines compromises the intention of the Act . . .

Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on

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[52] [Continued]

Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works on the Implementation of the Clean Air Act Amendments of 1970, 92d Cong., 2d Sess., at 21 (1972).

the Implementation of the Clean Air Act Amendments of 1970, 92d Cong., 2d Sess. at 308 (1972).

The vice in section 88-906 is similar to the vice in Georgia's trade secrets provision: it is overinclusive. The provision does not distinguish between situations where cost and feasibility considerations compete with other considerations and those where they do not. It is, of course, appropriate for state air pollution control officials to take into account cost and feasibility factors in most circumstances; their doing so is proscribed only when those considerations are in conflict with considerations of public health. As it stands, the provision may deflect state officials from properly discharging their duties under the state implementation plan. And, like the trade secrets provision, it may invite time-consuming litigation brought by private parties, litigation which could impede the progress of the state's implementation plan.

In support of the Administrator's approval of the statute, the EPA notes that consideration of economic factors is proper in the context of the attainment of the national *secondary* standards, and asserts that section 88-906(h)-(i), (k), (*o*), and (q) will be applied only in that context. We cannot accept this argument. The language of the statute still exists on the statute books, and still, on its face, directs officials to weigh these considerations against considerations of public health. As long as this is the case, there will remain a danger that state officials will be influenced by the statute.

Thus we conclude that the Administrator's approval of the statute exceeded his authority, and direct him to publish forthwith his disapproval of section 88-906(h)-(i), (k), (*o*), and (q).

ORDER

The actions the Administrator is directed to take in accordance with this opinion are set forth in the final paragraph of sections II, III, and V of this opinion, and in the final two paragraphs of section IV.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1972

No. 72-2402

NATURAL RESOURCES DEFENSE COUNCIL, INC., Project on Clean Air, Save America's Vital Environment, Inc., JANEY WEBER and SUSANNE ALLSTROM,
PETITIONERS,

versus

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

Petition for Review of an Order of the Environmental Protection Agency (GEORGIA CASE)

Before WISDOM, DYER and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Natural Resources Defense Council, Inc., et al for review of an order of the Environmental Protection Agency, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Environmental Protection Agency in this cause be, and the same is hereby, reversed;

It is further ordered that respondent pay to petitioners, the costs on appeal to be taxed by the Clerk of this Court.

February 8, 1974

Issued as Mandate: March 4, 1974

APPENDIX C

CLEAN AIR AMENDMENTS OF 1970

* * * *

National Ambient Air Quality Standards

"Sec. 109. (a)(1) The Administrator

"(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

"(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

"(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

"(b)(1) National primary ambient air quality standards, prescribed under subsection (a) shall be

ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

"(2) Any national secondary ambient air quality standard prescribed, under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

[42 U.S.C. 1857c-4]

IMPLEMENTATION PLANS

"SEC. 110. (a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted

under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

"(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be

necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovermental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

"(3) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

"(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under Section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality

control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

"(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed eighteen months from the date otherwise required for submission of such plan.

"(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

"(1) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

"(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

"(3) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provition of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

"(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

"(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

"(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to per-

mit compliance within such three-year period, and

"(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

"(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

"(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

"(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

"(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

"(A) good faith efforts have been made to comply with such requirement before such date,

"(B) such source (or class) is unable to comply with such requirement because the necessary

technology or other alternative methods of control are not available or have not bee available for a sufficient period of time,

"(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

"(D) the continued operation of such source is essential to national security or to the public health or welfare, then the Administrator shall grant a postponement of such requirement.

"(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

"(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States Court of Appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to af-

firm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

"(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

"(D) Section 307 (a) (relating to subpoenas) shall be applicable to any proceeding under this subsection.

[42 U.S.C. 1857c-5]

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Supreme Court, U. S.
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NOV 25 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioners

—v.—

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANE WEBER, AND SUSANNE ALLSTROM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
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RELEVANT DOCKET ENTRIES

June 30, 1972	Filed petition for review
September 12, 1972	Filed certified list of documents
September 13, 1973	Filed notice of election Rule 30(c)
November 15, 1972	Filed brief of Petitioner (NRDC)
December 26, 1972	Filed brief of Respondents
January 26, 1973	Filed reply brief of Petitioners
January 30, 1973	Filed Supplemental Certified Index of Record in lieu of Record
February 20, 1973	Filed Appendix
August 22, 1973	Filed copy of Georgia implementation plan
February 8, 1974	Filed court's opinion
March 25, 1974	Filed denial of Respondent's Motion for Stay of Mandate
June 12, 1974	Filed notice from United States Supreme Court that Respondent's Motion for Stay of part III of mandate granted

Title 40—Protection of Environment

Subpart A—General Provisions

§ 51.1 Definitions.

As used in this part, all terms not defined herein shall have the meaning given them in the Act:

(a) "Act" means the Clean Air Act (42 U.S.C. 1857-18571, as amended by Public Law 91-604, 84 Stat. 1676).

(b) "Administrator" means the Administrator of the Environmental Protection Agency (EPA) or his authorized representative.

(c) "Primary standard" means a national primary ambient air quality standard promulgated pursuant to section 109 of the Act.

(d) "Secondary standard" means a national secondary ambient air quality standard promulgated pursuant to section 109 of the Act.

(e) "National standard" means either a primary or a secondary standard.

(f) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a facility, building, structure, or installation which directly or indirectly results or may result in emissions of any air pollutant for which a national standard is in effect.

(g) "Local agency" means any local government agency, other than State agency, which is charged with the responsibility for carrying out a portion of a plan.

(h) "Regional Office" means one of the ten (10) EPA Regional Offices.

(i) "State agency" means the air pollution control agency primarily responsible for development and implementation of a plan under the Act.

(j) "Local agency" means any air pollution control agency other than a State agency, which is charged with responsibility for carrying out a portion of a plan.

(k) "Point source" means:

(1) Any stationary source causing emissions in excess of 100 tons (90.7 metric tons) per year of any pollutant for which there is a national standard in a

region containing an area whose 1970 "urban place" population, as defined by the Bureau of Census, was equal to or greater than 1 million or

(2) Any stationary source causing emissions in excess of 25 tons (22.7 metric tons) per year of any pollutant for which there is a national standard in a region containing an area whose 1970 "urban place" population, as defined by the U.S. Bureau of the Census, was less than 1 million and

(3) Without regard to amount of emissions, stationary sources such as those listed in Appendix C to this part.

(l) "Area source" means any small residential, governmental, institutional, commercial, or industrial fuel combustion operations; onsite solid waste disposal facility; motor vehicles, aircraft, vessels, or other transportation facilities; or other miscellaneous sources such as those listed in Appendix D to this part, as identified through inventory techniques similar to those described in: "A Rapid Survey Technique for Estimating Community Air Pollution Emissions," Public Health Service Publication No. 999-AP-29, October 1966.

(m) "Region" means (1 an air quality control region designated by the Secretary of Health, Education, and Welfare or the Administrator, (2) any area designated by a State agency as an air quality control region and approved by the Administrator, or (3) any area of a State not designated as an air quality control region under subparagraph (1) or (2) of this paragraph.

(n) "Control strategy" means a combination of measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of a national standard, including, but not limited to, measures such as:

(1) Emission limitations.

(2) Federal or State emission charges or taxes or other economic incentives or disincentives.

(3) Closing or relocation of residential, commercial, or industrial facilities.

(4) Changes in schedules or methods of operation of commercial or industrial facilities or transportation sys-

tems, including, but not limited to, short-term changes made in accordance with standby plans.

(5) Periodic inspection and testing of motor vehicle emission control systems, at such time as the Administrator determines that such programs are feasible and practicable.

(6) Emission control measures applicable to in-use motor vehicles, including, but not limited to, measures such as mandatory maintenance, installation of emission control devices, and conversion to gaseous fuels.

(7) Measures to reduce motor vehicle traffic, including, but not limited to, measures such as commuter taxes, gasoline rationing; parking restrictions, or staggered working hours.

(8) Expansion or promotion of the use of mass transportation facilities through measures such as increases in the frequency, convenience, and passenger-carrying capacity of mass transportation systems or providing for special bus lanes on major streets and highways.

(9) Any land use or transportation control measures not specifically delineated herein.

(10) Any variation of, or alternative to, any measure delineated herein.

(o) "Reasonably available control technology" means devices, systems, process modifications, or other apparatus or techniques, the application of which will permit attainment of the emission limitations set forth in Appendix B to this part, provided that Appendix B to this part is not intended, and shall not be construed, to require or encourage State agencies to adopt such emission limitations without due consideration of (1) the necessity of imposing such emission limitations in order to attain and maintain a national standard, (2) the social and economic impact of such emission limitations, and (3) alternative means of providing for attainment and maintenance of such national standard.

(p) "Compliance schedule" means the date or dates by which a source or category of sources is required to comply with specific emission limitations contained in an implementation plan and with any increments of progress toward such compliance.

(q) "Increments of progress" means steps toward compliance which will be taken by a specific source, including:

(1) Date of submittal of the source's final control plan to the appropriate air pollution control agency;

(2) Date by which contracts for emission control systems or process modifications will be awarded; or date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification;

(3) Date of initiation of on-site construction or installation of emission control equipment or process change;

(4) Date by which on-site construction or installation of emission control equipment or process modification is to be completed; and

(5) Date by which final compliance is to be achieved.

(r) "Transportation control measure" means any measure, such as reducing vehicle use, changing traffic flow patterns, decreasing emissions from individual motor vehicles, or altering existing modal split patterns that is directed toward reducing emissions of air pollutants from transportation sources.

(s) "Vehicle trip" means any movement of a motor vehicle from one location to another that results in the emission of air pollutants by the motor vehicle.

(t) "Trip type" means any class of vehicle trips possessing one or more characteristics (e.g., work, nonwork; peak, off-peak; freeway, nonfreeway) that distinguish vehicle trips in the class from vehicle trips not in the class.

(u) "Vehicle type" means any class of motor vehicles (e.g., precontrolled, heavy duty vehicles, gasoline powered trucks) whose emissions characteristics are significantly different from the emissions characteristics of motor vehicles not in the class.

(v) "Traffic flow measure" means any measure, such as signal light synchronization, freeway metering and curbside parking restrictions, that is taken for the purpose of improving the flow of traffic and thereby reducing emissions of air pollutants from motor vehicles.

(w) "Roadway type" means any class of roadway facility that can be broadly categorized as to function and assigned average speed and capacity values, e.g., expressway, arterial, collector, and local.

(x) "Time period" means any period of time designated by hour, month, season, calendar year, averaging time, or other suitable characteristics, for which ambient air quality is estimated.

[36 FR 22398, Nov. 25, 1971, as amended at 37 FR 26311, Dec. 9, 1972; 38 FR 15195, June 8, 1973; 38 FR 15835, June 18, 1973]

* * * * *

§ 51.5 Submission of plans; preliminary review of plans.

(a) Submission to the Administrator shall be accomplished by delivering five copies of the plan to the appropriate Regional Office and a letter to the Administrator notifying him of such action. Plans shall be adopted by the State and submitted to the Administrator by the Governor as follows:

(1) For any primary standard, within 9 months after promulgation of such standard.

(2) For any secondary standard, within 9 months after promulgation of such secondary standard or by such later date prescribed by the Administrator pursuant to Subpart C of this part.

(3) For compliance with the requirements of §§ 51.11 (a) (4) and 51.18, no later than August 15, 1973.

(b) Plans for different regions within a State may be submitted as a single document or as separate documents.

(c) Upon request of a State, the Administrator will provide preliminary review of a plan or portion thereof submitted in advance of the date such plan is due. Such requests shall be made in writing to the appropriate Regional Office and shall be accompanied by five copies of the materials to be reviewed. Requests for preliminary review shall not operate to relieve a State of the responsibility of adopting and submitting plans in accordance with prescribed due dates.

(d) Submission to the Administrator shall be accomplished by delivering 10 copies of the transportation control portions of the plan to the appropriate regional office. Such portions shall be adopted by the State and submitted by the Governor.

(e) Upon request of a State, the Administrator will provide preliminary review of the draft transportation control measures or portions thereof in advance of the date such measures are due. Such requests shall be made as provided in paragraph (c) of this section and shall not operate to relieve a State of its responsibility for adopting and submitting transportation control measures in accordance with prescribed due dates.

[36 FR 22398, as amended at 38 FR 15195, June 8, 1973, 38 FR 15836, June 18, 1973]

§ 51.6 Revisions.

(a) The plan shall be revised from time to time, as may be necessary, to take account of:

(1) Revisions of national standards,

(2) The availability of improved or more expeditious methods of attaining such standards, such as improved technology or emission charges or taxes, or

(3) A finding by the Administrator that the plan is substantially inadequate to attain or maintain the national standard which it implements.

(b) The plan shall be revised within 60 days following notification by the Administrator under paragraph (a) of this section, or by such later date prescribed by the Administrator after consultation with the State.

(c) The plan may be revised from time to time consistent with the requirements applicable to implementation plans under this part.

(d) Any revision of any regulation or any compliance schedule pursuant to paragraph (c) of this section shall be submitted to the Administrator no later than 60 days after its adoption.

(e) Revisions other than those covered by paragraphs (a) and (d) of this section shall be identified and described in the next semiannual report required by § 51.7.

(f) Any revision shall be submitted only after any applicable hearing requirements of § 51.4 have been satisfied.

[37 FR 22398, Nov. 25, 1971, as amended at 37 FR 26312, Dec. 9, 1972]

* * * * *

§ 51.15 Compliance schedules.

(a)(1) Each plan shall contain legally enforceable compliance schedules setting forth the dates by which all stationary and mobile sources or categories of such sources must be in compliance with any applicable requirement of the plan. Such compliance schedules shall contain increments of progress required by paragraph (c) of this section.

(2) A plan may provide that compliance schedules for individual sources or categories of sources will be formulated following submittal of the plan. Such compliance schedules shall be submitted to the Administrator within 60 days following the date such schedule is adopted but in no case later than the prescribed date for submittal of the first semiannual report required by § 51.7: *Provided, however,* That compliance schedules for nitrogen oxides required for stationary source shall be submitted to the Administrator no later than the prescribed date for the submittal of the second semi-annual report required by § 51.7. Where submission of compliance schedules is deferred by a State under this subparagraph, the plan shall specify a final compliance date applicable to each source subject to an applicable requirement of the plan. Compliance schedules submitted pursuant to this subparagraph shall require each source or category of sources to comply with such requirement within the times specified in paragraph (b) of this section but in no event later than the date specified in the plan for final compliance with such requirement.

(b)(1) Any compliance schedule designed to provide for attainment of a primary standard shall provide for compliance with the applicable plan requirements as expeditiously as practicable and in no case, except as provided by Subpart C of this part, later than the date specified for attainment of such primary standard pursuant to § 51.10(b).

(2) Any compliance schedule designed to provide for attainment of a secondary standard shall provide for compliance with the applicable plan requirements in a reasonable time and in no case, except as provided in Subpart C of this part, later than the date specified for the attainment of such secondary standard pursuant to § 51.10(c).

(c) Any compliance schedule or revision thereof extending over a period of more than 1 year from the date of its adoption by the State agency shall provide for legally enforceable increments of progress toward compliance by each affected source or category of sources: *Provided however*: That increments of progress shall not be required for a compliance schedule which does not extend beyond January 31, 1974. Increments of progress shall include, where practicable, each increment of progress specified in § 51.1(q) and shall include such additional increments of progress as may be necessary to permit close and effective supervision of progress toward timely compliance.

[37 FR 26312, Dec. 9, 1972]

* * * * *

§ 51.32 Request for 1-year postponement.

(a) Pursuant to section 110(f) of the Act,[1] the Governor of a State may request, with respect to any stationary source or class of moving sources, a postponement for not more than 1 year of the applicability of any portion of the control strategy.

(b) Any such request regarding sources located in an interstate region shall show that the Governor of each State in the region has been notified of such request.

(c) Any such request shall clearly identify the source(s) and portion(s) of the control strategy which are the subject of such request and shall include informa-

[1] Defined term (Clean Air Act) see definitions.

tion relevant to the determinations required by section 110(f) of the Act.

(d) A public hearing will be held, before the Administrator or his designee, on any such request.

(e) No such request shall operate to stay the applicability of the portion(s) of the control strategy covered by such request.

(f) A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6.

[36 FR 22398, Nov. 25, 1971, as amended at 38 FR 15958, June 19, 1973]

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§ 52.572 Approval status.

The Administrator approves Georgia's plan for attainment and maintenance of the national standards.

[37 FR 19808, Sept. 22, 1972]

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39 Fed. Reg. 34533-34535

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 261-7]

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Variances, Enforcement Orders, and Confidentiality Provisions

DEFERRAL OF IMPLEMENTATION PLAN REQUIREMENTS

During the past 12 months, four Circuit Courts of Appeal have addressed the question of whether a state may extend a source's compliance date under the State's implementation plan without satisfying the substantive and procedural requirements of Section 110(f) of the Clean Air Act (Act). Three of these courts—the First, Second and Eighth Circuits [1]—held that source compliance dates could be deferred through the mechanism of a State-issued and EPA-approved variance or enforcement order but only up to the attainment date for meeting the primary ambient air quality standards. In most instances, the date for meeting the primary standards is no later than July 31, 1975. However, in some air quality control regions (AQCRs), primary standards attainment dates have been deferred up to two years through extensions granted under authority of Section 110(e) of the Act.

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[1] Natural Resources Defense Council, Inc. (NRDC) et al. v. EPA, 478 F.2d 875 (1st Cir. 1973), NRDC et. al. v. EPA (Nos. 72-1728 and 72-2165, 2nd Cir., March 13, 1974), NRDC et. al. v. EPA, 483 F.2d 690 (8th Cir. 1973).

From a technical standpoint, the pronouncements of the three circuit courts referred to above can be treated as applying only to those States which are within the jurisdiction of the courts. However, the Administrator believes that when three appellate courts uniformly resolve an issue which is common to every state, the decisions of the courts should be accepted as strongly persuasive guidance for Agency action in all states. Accordingly, the Administrator has determined that the proper course of action is to revise 40 CFR Part 51 (Regulations for Preparation, Adoption, and Submittal of Implementation Plans) to be consistent with the decisions of the courts, and to simultaneously disapprove in 40 CFR Part 52 (Approval and Promulgation of Implementation Plans) the provisions in all plans which have deferral authority inconsistent with the terms of 40 CFR Part 51 as revised. This revision and disapproval are published as final rulemaking in another part of this FEDERAL REGISTER. Regulations limiting the issuance of variances, enforcement orders or other state-initiated measures designed to defer compliance with the applicable plan are proposed below for all states. Those proposed regulations will supersede the variance portion of the June 11, 1974 proposal (39 FR 20511) for the State of Washington. This action is being taken so that the regulatory language will be uniform for all states. For the same reason these regulations are being proposed for Indiana, Iowa, Massachusetts, and Rhode Island, even though regulations were promulgated previously for these states.

The fourth appellate court[2] to address the issue of compliance date deferrals held that section 110(f) of the Act is the exclusive means of deferring a compliance date even where the deferral does not go beyond the date for attaining primary standards. It is the Administrator's opinion that compliance dates which do not go beyond applicable attainment dates for primary or secondary standards should be dealt with as a plan revision pursuant to 40 CFR 51.6 and 51.8. Accordingly, the Agency has requested the Supreme Court to review

[2] NRDC et al. v. EPA (N. 72-2402, 5th Cir. February 8, 1974).

the Fifth Circuit Court's opinion and to stay the decision of the court pending the outcome of the review. On June 10, 1974, the Supreme Court granted both requests. However, the Fifth Circuit opinion, unless overturned by the Supreme Court, represents the law in the six-state area encompassed by the boundaries of the Fifth Circuit. Therefore, although the Part 51 and related Part 52 actions announced herein will apply to these states if the decision of Fifth Circuit on this issue is overturned, final Agency action on this matter must await the decision of the Supreme Court. The variance and/or enforcement order provisions presently contained in implementation plans for the six affected states will, however, be subject to the categorical disapproval notice which is also being announced herein.

As indicated above, there may be instances where, pursuant to the provisions of section 110(e) of the Act, the attainment date for meeting a primary standard in a given AQCR has been extended beyond 1975. Where such an extension has been granted, revised § 51.32(f) provides that compliance date deferrals which go no further than the extension date may be issued without looking to the provisions of § 110(f) of the Act. However, such deferrals will be subject to the requirement that they apply only to those sources for which technological inability served as the basis for the section 110(e) extension. In addition, the compliance date reflected in such deferrals must still be based upon that degree of progress which, under the circumstances, is as expeditious as can practicably be required of the source.

In distinguishing between the "pre" and "post" attainment date periods for meeting a primary standard it appears that the First, Second and Eighth Circuits were limiting their holdings to those compliance date provisions which were part of a control strategy for meeting a primary ambient air quality standard. Nevertheless, the Agency construes the "pre" and "post" attainment date principle established by these courts in the realm of primary standards as a substantial indication of what must be done with respect to compliance date provisions designed to meet the secondary standards. Ac-

cordingly, the Part 51 revision promulgated below extends the "pre" and "post" attainment date dichotomy to the secondary standards and provides that (apart from relief obtainable under section 110(f) no compliance date which is part of a control strategy designed to meet the secondary standards may be extended beyond the applicable attainment date specified in 40 CFR Part 52.

Unlike the mid-1975 date which, under section 110(a)(2)(A)(i), is generally the date for attaining the primary standards, the Clean Air Act provides no specific date for attaining the secondary standards, but, instead, instructs the states to adopt (and the Agency to approve) secondary standard attainment dates which are reasonable. Part 51, however, established mid-1975 as the reasonable date, subject to a State's showing that good cause existed for deferring the date. Many states have made such a showing. Accordingly, the Part 51 postponement provisions which apply to the secondary standards do not have a generally applicable attainment date.

With respect to variances aimed at secondary standard plan requirements, it has been contended that the approval of such variances would depend on a potentially difficult determination of whether the plan requirement being waived is necessary for attainment of primary versus secondary standards. The Administrator has considered this argument and found it to be unpersuasive. Where a plan contains a single control strategy for attainment of both primary and secondary standards, the attainment dates will be identical, thus making it unnecessary to distinguish whether a variance would prevent attainment of primary or secondary standards. Correspondingly, where the date for attainment of primary standards is different than the secondary standards attainment date, the plan contains separate control measures necessary for attainment of each standard. Thus, any variance could be easily associated with the control strategy for attainment of a specific standard.

Also as a result of the Fifth Circuit decision referenced above, § 52.26(b) is added below to make it clear that provisions in an implementation plan which either ex-

plicitly or implicitly direct State officials, charged with constructing the terms of enforcement orders or variances, to give proper regard to availability of technology, source hardship, or economic burden can not be considered as a basis for approving a compliance date postponement which goes beyond the end limits established under Part 51 as revised herein. The new language has been added as a means of discouraging source-initiated State court litigation over the reasonableness of enforcement orders which have compliance schedule terms consistent with the requirements of Part 51 as revised herein. Without such qualifying language, it is feared that some sources might choose to litigate properly constructed compliance schedules issued by State officials on the ground that a later compliance date is warranted because of hardship, economic burden, or technological difficulties.

By contrast, the new language is not intended, in any way, to conflict with the existing Part 51 language which is contained in § 51.2(b) and (d). These two paragraphs, which have always permitted States to consider the cost-effectiveness of a control strategy as well as its social and economic consequences, still permit States to do so. However, the introduction of the new language referred to above makes it clear that these considerations cannot serve as the basis for issuing an enforcement order of granting a variance which has a terminal date that goes beyond the applicable end date established under the Part 51 revisions contained herein.

The Fifth Circuit decision involving the "source hardship" issue was not related specifically to variances and enforcement orders, but dealt with general enabling statutes which mandated such consideration in all state agency actions. The Court ordered the Administrator to disapprove the general statute in the Georgia plan. Although this disapproval is published below for the Georgia plan, the Administrator does not agree that it is necessary to disapprove such general provisions in all other state plans, since Part 51 allows such considerations under the specific circumstances noted above. Therefore, the provisions of § 52.26(b) only restrict the use of such

hardship provisions where it would conflict with the provisions of §§ 51.15(d) or 51.32(f) as revised below. By focusing on variances and enforcement orders, it is the Administrator's judgment that all illegal use of a generalized technological and "source hardship" provision will be prevented. This is consistent with the following statement in Fifth Circuit opinion: "It is, of course, appropriate for state air pollution control officials to take into account cost and feasibility factors in most circumstances; their doing so is proscribed only when those considerations are in conflict with considerations of public health," i.e., primary standards attainment dates.

Since the Part 51 revisions and the new Part 52 provision set forth below (as well as the plan disapprovals which derive from the Part 51 revisions) are the result of circuit court decisions, the Administrator finds that good cause exists for promulgating the revisions as immediately effective final rulemaking and for publishing the accompanying plan disapprovals as immediately effective final Agency action. For the same reason, § 52.26 is also being published as final Agency rulemaking and will also be effective on the date of publication. However, the Administrator feels that it would be appropriate to accept comments from the public and the affected States concerning the actions taken below. Comments may be submitted to the Environmental Protection Agency, Standards Implementation Branch, Research Triangle Park, North Carolina 27711, Attention Mr. Clark. All relevant comments received not later than 30 days after the date of publication of this notice will be considered, and where appropriate, revisions will be made. Comments received will be available for public inspection during normal business hours at the Office of Public Affairs, 401 M Street, SW., Washington, D.C. 20460.

The Administrator strongly urges States to modify their enabling legislation to be consistent with the revised Part 51 and new Part 52 requirements set forth below, and to submit such revised legislation to the Administrator for approval. Where approvable changes are submitted, the Administrator will revoke the disapproval issued below.

* * * * *

Dated: September 19, 1974

JOHN QUARLES,
Acting Administrator.

Parts 51 and 52, Chapter I, Title 40 of the Code of Federal Regulations are amended as follows:

1. In § 51.11, paragraph (g) is added as follows:

§ 51.11 Legal authority.

* * * *

(g) Enabling authority relating to the issuance of enforcement orders, variances, or other State-initiated measures designed to defer compliance with a plan requirement which is necessary for attainment of a national standard shall specifically provide for consistency with the following requirements.

(1) Except as provided in paragraph (g)(2) of this section compliance may not be deferred beyond the applicable attainment date specified in Part 52 of this chapter. Where a plan contains different attainment dates for primary and secondary standards (i.e., specific measures have been identified for attaining primary standards and additional measures have been identified for attaining secondary standards), a plan requirement necessary for attainment of primary standards may not

be deferred beyond the primary standards attainment date and a plan requirement for attainment of secondary standards may not be deferred beyond the secondary standards attainment date.

(2) Where the Governor of a State has requested, and the Administrator (under authority of section 110(f) of the Clean Air Act) has approved a compliance date postponement with respect to a given source, compliance may be deferred for such source only up to the expiration date of the 110(f) postponement.

(3) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Clean Air Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the 110(e) extension.

2. In § 51.15, paragraph (d) is added as follows:

§ 51.15 Compliance schedules.

* * * * *

(d) Regulations relating to the issuance of compliance schedules in conjunction with or pursuant to enforcement orders, variances, or other measures designed to obtain compliance with a plan requirement which is necessary for attainment of a national standard shall specifically provide for consistency with the following requirements.

(1) Except as provided in paragraph (d)(2) of this section, compliance schedules may not set forth dates of compliance which extend beyond applicable attainment dates specified in Part 52 of this chapter. Where a plan contains different dates of attainment for primary and secondary standards, a compliance schedule for a source included in the applicable control strategy for attainment of primary standards may not set forth a date of compliance which extends beyond the attainment date for such primary standards, and a compliance schedule for a source included in the applicable control strategy for attainment of secondary standards may not set forth a

date of compliance which extends beyond the attainment date for such secondary standards.

(2) Where the Governor of a State has requested, and the Administrator (under authority of section 110(f) of the Clean Air Act) has approved a compliance date postponement with respect to a given source, the compliance schedule for such source may set forth a date of compliance only up to the expiration date on the 110(f) of postponement.

(3) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Clean Air Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the 110(e) extension.

(4) Any change to a compliance date shall not become part of the applicable plan until the change has been submitted to and approved by the Administrator as a plan revision under §§ 51.6 and 51.8 of this chapter.

3. In § 51.32, paragraph (f) is revised. As amended, § 51.32 reads as follows:

§ 51.32 Request for 1-year postponement.

* * * * *

(f) A State's decision to defer the date by which a source must achieve compliance with an applicable plan provision will not necessitate a request for postponement under this section if the deferral meets the following requirements:

(1) Compliance is not deferred beyond the applicable attainment date specified in Part 52 of this chapter. Where a plan contains different dates of attainment for primary and secondary standards (i.e., specific measures have been identified for attainment of primary standards and additional measures have been identified for attainment of secondary standards), the applicable attainment date for the purposes of this paragraph shall be deter-

mined by whether the plan requirement being deferred is necessary for attainment of primary standards or secondary standards.

(2) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Clean Air Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the 110(e) extension.

4. In Subpart A of Part 52, the introductory paragraph of § 52.20 is amended as follows:

§ 52.20 Attainment dates for national standards.

Each subpart contains a section which specifies the latest dates by which national standards are to be attained in each region in the State. An attainment date which only refers to a month and a year (such as July 1975) shall be construed to mean the last day of the month in question. * * *

5. In Subpart A of Part 52, § 52.26 is added as follows:

§ 52.26 Variances and enforcement orders.

(a) Subsequent to May 31, 1972, the Administrator reviewed state implementation plans to determine whether the plans will allow or permit the issuance of variances, enforcement orders, or other state-initiated measures designated to defer compliance with an applicable plan requirement after the dates specified in section 110 of the Clean Air Act for attainment of national primary and secondary ambient air quality standards. The review indicates that state plans generally are not consistent with the Clean Air Act in this regard. Accordingly, all state plans are disapproved to the extent that their enabling authority and regulations permit the deferral of compliance with applicable plan requirements beyond the statutory attainment dates specified in the Clean Air Act. This disapproval applies to all States listed in Subparts B through DDD of this part.

(b) No provision in a plan which either explicitly or implicitly directs a state official to take cognizance of source hardship, availability of technology, or economic burden may be construed to permit the issuance of a variance, enforcement order, or any other state-initiated deferral measure which has a terminal date for compliance that conflicts with the provisions of §§ 51.15(d) or 51.32 (f) of this chapter.

* * * * *

39 Fed Reg. 34572-34574

[40 CFR Part 52]

[FRL 261-8]

APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Deferral of Implementation Plan Requirements and Public Availability of Emission Data

During the past 12 months, four Circuit Courts of Appeal have addressed the question of whether a state may extend a source's compliance date without satisfying the substantive and procedural requirements of section 110(f) of the Clean Air Act (Act). Three of these courts—the First, Second and Eighth Circuits[1]—held that source compliance dates could be deferred through the mechanism of a State-issued and EPA-approved variance or enforcement order but only up to the attainment date for meeting the primary ambient air quality standards. In most instances, the date for meeting the primary standards is no later than July 31, 1975. However, in some air quality control regions (AQCRs), primary standards attainment dates have been deferred by extensions granted under authority of § 110(e) of the Act.

From a technical standpoint, the pronouncements of the three circuit courts referred to above can be construed as applying only to those States which are within the jurisdiction of the courts. However, the Administrator believes that when three appellate courts uniformly resolve an issue which is common to every state, the decisions of the courts should be accepted as strongly persuasive guidance for Agency action in all states. Accordingly, the Administrator has determined that the proper course of action is to revise 40 CFR Part 51 (Regulations for Preparation, Adoption, and Submittal of Implementation Plans) to be consistent with the deci-

[1] Natural Resources Defense Council, Inc. (NRDC) et. al. v. EPA, 478 F.2d 875 (1st Cir. 1973) NRDC et. al. v. EPA (Nos. 72-1728 and 72-2165, 2nd Cir., March 13, 1974) NRDC et. al. v. EPA, 483 F.2d 690 (8th Cir. 1973).

sions of the courts, and to simultaneously disapprove in 40 CFR Part 52 (Approval and Promulgation of Implementation Plans) the provisions in all plans which have deferral authority inconsistent with the terms of 40 CFR Part 51 as revised. This revision and disapproval are published as final rulemaking in another part of this FEDERAL REGISTER. Regulations limiting the issuance of variances, enforcement orders or other state-initiated measures designed to defer compliance with the applicable plan are proposed below for all states. These proposed regulations will supersede the variance portion of the June 11, 1974 proposal (39 FR 20511) for the State of Washington. This action is being taken so that the regulatory language will be uniform for all states. For the same reason these regulations are being proposed for Indiana, Iowa, Massachusetts, and Rhode Island, even though regulations were promulgated previously for these states. When finalized, the regulatory language proposed herein will supersede the extant variance regulations for these states.

The fourth appellate court[2] to address the issue of compliance date deferrals held that section 110(f) of the Act is the exclusive means of deferring a compliance date even where the deferral does not go beyond the date for attaining primary standards. It is the Administrator's opinion that compliance date deferrals which do not go beyond applicable attainment dates for primary or secondary standards should be dealt with as a plan revision pursuant to 40 CFR 51.6 and 51.8. Accordingly, the Agency requested the Supreme Court to review the Fifth Circuit Court's opinion, and to stay the decision of the Court pending the outcome of the review. On June 10, 1974, the Supreme Court granted both requests.

Irrespective of this appeal, it is clear that the variance and enforcement order provisions of these states must be disapproved along with those of all other states. However, although the replacement regulations proposed below will apply to the six states within the Fifth Circuit

[2] NRDC et. al. v. EPA (N. 72-2402, 5th Cir. February 8, 1974).

if the Supreme Court reverses the Fifth Circuit's decision, final Agency action on this matter must await the decision of the Supreme Court.

The replacement regulation proposed below requires that, except where a postponement has been granted pursuant to section 110(f) of the Act, no enforcement order, variance, or other state-initiated measure which defers compliance with a provision of the applicable plan shall be granted if it defers compliance beyond the applicable date for attainment of national standards specified in 40 CFR Part 52. Where a section 110(f) postponement has been granted for a given source, compliance for such source may be deferred only up to the expiration date of the section 110(f) postponement. Where a plan contains different dates for attainment of primary and secondary standards, a plan requirement necessary for attainment of primary standards may not be deferred beyond the primary standards attainment date and a plan requirement for attainment of secondary standards may not be deferred beyond the secondary standards attainment date. Finally, the regulation specifies that where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the

extension was granted, and only up to the expiration date of the section 110(e) extension.

• • • • •

Dated: September 19, 1974.

JOHN QUARLES,
Acting Administrator.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is proposed to be amended as follows:

1. In the following sections, paragraph (b) is added or revised as indicated below:

a. Subpart B—section 52.58 [added].
b. Subpart C—section 52.94 [added].
c. Subpart D—section 52.142 ([added].
d. Subpart E—section 52.180 [added].
e. Subpart F—section 52.268 [added].
f. Subpart G—section 52.342 [added].
g. Subpart H—section 52.378 [added].
h. Subpart I—section 52.430 [added].
i. Subpart J—section 52.498 [added].
j. Subpart K—section 52.527 [added].
k. Subpart L—section 52.579 [added].
l. Subpart M—section 52.630 [added].
m. Subpart N—section 52.681 added].
n. Subpart O—section 52.737 [added].
o. Subpart P—section 52.791 [revised].
p. Subpart Q—section 52.829 [revised].
q. Subpart R—section 52.882 [added].
r. Subpart S—section 52.930 [added].
s. Subpart T—section 52.984 [added].
t. Subpart U—section 52.1027 [added].
u. Subpart V—section 52.1114 [added].
v. Subpart W—section 52.1131 revised].
w. Subpart X—section 52.1179 [added].
x. Subpart Y—section 52.1233 [added].
y. Subpart Z—section 52.1278 [added].
z. Subpart AA—section 52.1337 [added].
a.a. Subpart BB—section 52.1380 [added].
b.b. Subpart CC—section 52.1434 [added].

c.c. Subpart DD—section 52.1484 [added].
d.d. Subpart EE—section 52.1527 [added].
e.e. Subpart FF—section 52.1601 [added].
f.f. Subpart GG—section 52.1627 [added].
g.g. Subpart HH—section 52.1687 [added].
h.h. Subpart II—section 52.1776 [added].
i.i. Subpart JJ—section 52.1828 [added].
j.j. Subpart KK—section 52.1882 [added].
k.k. Subpart LL—section 52.1928 [added].
l.l. Subpart MM—section 52.1985 [added].
m.m. Subpart NN—section 52.2057 [added].
n.n. Subpart OO—section 52.2079 [revised].
o.o. Subpart PP—section 52.2130 [added].
p.p. Subpart QQ—section 52.2177 [added].
q.q. Subpart RR—section 52.2231 [added].
r.r. Subpart SS—section 52.2301 [added].
s.s. Subpart TT—section 52.2332 [added].
t.t. Subpart UU—section 52.2378 [added].
u.u. Subpart VV—section 52.2450 [added].
v.v. Subpart WW—section 52.2480 [added].
w.w. Subpart XX—section 52.2527 [added].
x.x. Subpart YY—section 52.5280 [added].
y.y. Subpart Z—section 52.2629 [added].
z.z. Subpart AAA—section 52.2675 [added].
a.a.a. Subpart BBB—section 52.2727 [added].
b.b.b. Subpart CCC—section 52.2777 [added].
c.c.c. Subpart DDD—section 52.2825 [added].

Paragraph (b) reads as follows:

• • • • •

(b) *Regulation limiting variances.* No variance, enforcement order, or other state-initiated measure designed to defer compliance with a plan requirement which is necessary for attainment of a national standard shall be issued unless it specifically provides for consistency with the following requirements.

(1) Except as provided in paragraph (b)(2) of this section compliance may not be deferred beyond the applicable attainment date specified in Part 52 of this chapter. Where a plan contains different attainment dates for primary and secondary standards (i.e., specific

measures have been identified for attaining primary standards and additional measures have been identified for attaining secondary standards), the applicable attainment date for purposes of this paragraph shall be determined by whether a plan requirement being deferred is necessary for attainment of primary or secondary standards.

(2) Where the Governor of a state has requested, and the Administrator (under authority of section 110(f) of the Clean Air Act) has approved a compliance date postponement for a given source, compliance may be deferred for such source only up to the expiration date of the section 110(f) postponement.

(3) Where the Administrator has extended the date for attainment of a primary standard beyond July 31, 1975, pursuant to section 110(e) of the Act, compliance with a plan requirement necessary for attainment of such primary standard may be deferred beyond July 31, 1975, only for the source or sources for which the extension was granted and only up to the expiration date of the section 110(e) extension.

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Calendar No. 1214

91ST CONGRESS
2d Session

SENATE

REPORT
No. 91-1196

NATIONAL AIR QUALITY STANDARDS ACT OF 1970

SEPTEMBER 17, 1970.—Ordered to be printed

Mr. BYRD of West Virginia (for Mr. MUSKIE, from the Committee on Public Works, submitted the following

REPORT

together with

INDIVIDUAL VIEWS
[To accompany S. 4358]

The Committee on Public Works, to which the bill (S. 4358), to amend the Clean Air Act as amended, was referred having considered the same, reports favorably thereon without amendment. An original bill (S. 4358) is reported in lieu of S. 3229, S. 3466, and S. 3546 which were considered by the Committee.

GENERAL STATEMENT

The committee bill would restructure the methods available to attack a critical and growing national problem of air pollution.

The legislation reported by the committee is the result of deep concern for protection of the health of the American people. Air pollution is not only an aesthetic nuisance. The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major

pollutants (oxides of sulfur, particulates, carbon monoxide, hydrocarbons and oxidants). These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed.

The new information that carbon monoxide concentrations at levels damaging to public health occur in Chicago more than 22 percent of the time, and that other cities have similar problems with carbon monoxide and other pollutants, intensified the committee's concern to authorize a massive attack on air pollution. This bill is designed to provide the basis for such an attack.

NATIONAL AIR QUALITY STANDARDS AND GOALS

Sec. 110. (a)(1) Within thirty days after the date of enactment of this section, the Secretary shall publish in the Federal Register, in accordance with section 553 of title 5 of the United States Code, proposed national ambient air quality standards for any air pollution agent or combination of such agents for which air quality criteria have been issued prior to the date of enactment of this section. He shall, after a reasonable time for interested persons to submit written comments thereon, promugate such proposed national ambient air quality standards with such modifications as he deems appropriate. Such promulgation shall occur no later than ninety days after the initial publication of such proposed national ambient air quality standards.

(2) With respect to any air pollution agent or combination of such agents for which air quality criteria and information and control techniques are issued subsequent to enactment of this section, the Secretary shall publish, simultaneously with the issuance of such criteria and information, proposed national ambient air quality standards for any such pollution agent or combination of such agents. The procedure provided for in paragraph (1) of this subsection shall apply.

(3) National ambient air quality standards, proposed and promulgated to paragraphs (1) and (2) of this sub-

section, shall be ambient air quality standards the attainment and maintenance of which are necessary to protect the health of persons. Such standards shall be revised, as necessary, in the same manner as promulgated.

(b) Simultaneously with the initial publication of proposed national ambient air quality standards pursuant to subsection (a) of this section, the Secretary shall publish proposed national ambient air quality goals the attainment and maintenance of which are necessary to protect the public health and welfare from any known or anticipated adverse effects associated with the presence of such air pollution agent or combination of such agents in the ambient air, including, but not limited to, adverse effects on soils, water, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, as well as effects on economic values. Such national ambient air quality goals shall be published and promulgated in the same manner as prescribed in subsection (a) of this section for proposed national ambient air quality standards. Such goals shall be revised as necessary, in the same manner as promulgated.

IMPLEMENTATION PLANS

Sec. 111. (a)(1) After the promulgation of national ambient air quality standards and national ambient air quality goals, or revisions thereof under section 110 of this Act, for any air pollution agent or combination of such agents, each State shall, after reasonable notice and public hearings, adopt and submit to the Secretary, within nine months after such promulgation, a plan for implementation, maintenance, and enforcement of such standards and goals in each air quality control region designated or established pursuant to this Act. Unless a separate public hearing is provided, each State shall consider adoption of ambient air quality standards which are more restrictive than the national ambient air quality standards at the hearing required by this paragraph.

(2) The Secretary shall, within four months after the date required for such submission, act to approve or to disapprove such plan or portion thereof. The Secretary

shall approve such plan, or any portion thereof, if he determines that it—

(A) provides for the attainment of such national ambient air quality standards within three years from the date of approval of such plan;

(B) includes emission requirements, schedules and timetables of compliance, and such other measures as necessary to insure attainment of any applicable ambient air quality standard and goal;

(C) includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Secretary;

(D) includes, to the extent necessary, appropriate procedures, including, but not limited to, land-use and air and surface transportation controls and permits, for insuring that any source of air pollution agents or combination of such agents will be located, operated, and for other than moving sources, designed, constructed, and equipped in such a way that such sources will not interfere with implementation, maintenance, and enforcement of any applicable air quality standard and goal;

(E) contains adequate provisions for intergovernmental co-operation, including measures necessary to insure that emissions of such agents or combination of such agents from sources located in one air quality control region will not cause or contribute to a violation of such air quality standards or prevent attainment of such air quality goals in any other air quality control region or portion thereof;

(F) provides (i) that any person who owns, leases, operates, or controls any stationary source subject to the provisions and requirements of such implementation plan shall be required to furnish to the appropriate State agency periodic reports on the nature and amounts of emissions of any air pollution agent or combinations of such agents from such source, and (ii) that such reports shall be correlated by the State agency with any emission requirements

or standards established pursuant to this Act which reports shall be part of the public record and available at reasonable times for public inspection;

(G) provides necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, including requirements for installation of monitoring equipment and methods on sources subject to emission requirements; periodic reporting on the nature and amounts of emissions; and authority comparable to that in section 303 of this Act, and contingency plans to implement such authority as determined by the Secretary;

(H) provides, to the extent necessary, for a program of periodic inspection and testing of motor vehicles, as authorized by section 208 of this Act;

(I) provides for revision, after public hearings, of such plan from time to time as may be necessary to take account of revisions of such ambient air quality standards and goals or availability of improved or more expeditious methods of achieving such standards and goals; and

(J) identifies the air quality control region to which such plan applies including the boundaries of such region if it is one resulting from a subdivision under section 108(a) of this Act.

(3) Each approved plan, or portion thereof, for implementation, maintenance, and enforcement of such standards and goals shall be the implementation plan applicable to such air quality control region.

(b) The Secretary may, wherever he determines necessary, extend the period for submission of any portion of any plan for implementation of any national ambient air quality goal, for a period not to exceed eighteen months from the date otherwise required for submission of such plan.

(c) The Secretary shall, after consideration of any State hearing record promptly prepare and publish proposed regulations setting forth such as plan, or portion thereof, for such quality air control region if (1) a

State fails to submit, for any air quality control region, or portion thereof, a plan for implementation, maintenance, and enforcement of ambient air quality standards and goals within the time prescribed, or (2) the plan, or portion thereof, submitted for any such region is determined by the Secretary not to be in accordance with the requirements of this section. If such State held no public hearing associated with adoption of an implementation plan, the Secretary shall provide opportunity for such hearing within such region on any proposed regulation for such region. The Secretary shall, within six months after the date required for submission of such plans, promulgate any such regulations unless, prior to such promulgation, the subject State has adopted and submitted a plan which the Secretary determines to be in accordance with the requirements of this section. A plan promulgated by the Secretary for any air quality control region shall be the plan applicable to such region in the same manner as if such plan had been adopted by the subject State and approved by the Secretary pursuant to subsection (a) of this section and shall remain in effect until such State submits a plan and it is approved under this section.

(d) Ambient air quality standards and implementation plans adopted by States and submitted to the Secretary pursuant to this Act prior to enactment of this section shall remain in effect, unless the Secretary determines that such air quality standards and implementation plans, or portions thereof, are not consistent with the applicable requirements of this Act and will not provide for the attainment of national ambient air quality standards in the time required by this Act. If the Secretary so determines, he shall, within ninety days after promulgation of any national ambient air quality standards pursuant to section 110(a)(1) of this Act, notify the appropriate State or States and specify in what respects changes are needed to meet the additional requirements of this Act, including requirements to implement ambient air quality goals. If such changes are not adopted by the State, or States after public hearings and within six months after such notification, the Secretary shall

promulgate such changes pursuant to subsection (c) of this section.

(e)(1) Whenever, the Secretary or his authorized representative finds new information developed from surveys, studies, investigation, or reports, or any information otherwise made available to him, that, in any air quality control region, an approved or promulgated implementation plan will be, or has been, substantially inadequate to achieve national ambient air quality standards promulgated pursuant to this Act, the Secretary shall notify the appropriate State or States of such new information and shall allow the appropriate State or States an opportunity to respond. If such State or States fails to respond within ninety days after receipt of such notice, or if such response is inadequate, the Secretary shall revise and promulgate such plan within four months, in accordance with provisions of section 553 of title 5 of the United States Code. Such revision may include an extension of the period required to obtain the quality of air established by any national ambient air quality standard established pursuant to this Act, except that such extension shall not exceed one year. No further extension shall be granted pursuant to this provision and no extension shall affect any emission requirement, timetable, or schedule of compliance adopted as a part of the plan subject to revision unless such requirement, timetable, or schedule is the subject of such revision.

(2) Any revised plan promulgated pursuant to this subsection shall be the plan applicable to such region in the same manner as if such plan had been adopted by the State and approved by the Secretary pursuant to this section.

(f)(1) No later than one year before the expiration of the period for the attainment of ambient air of the quality established for any national ambient air quality standard pursuant to section 110 of this Act, the Governor of a State in which is located all or part of an air quality control region designated or established pursuant to this Act may file a petition in the district court of the United States for the district in which all or a part of such air quality control region is located against the

United States for relief from the effect of such expiration (A) on such region or portion thereof, or (B) on a person or persons in such air quality control region. In the event that such region is an interstate air quality control region or portion thereof, any Governor of any State which is wholly or partially included in such interstate region shall be permitted to intervene for the presentation of evidence and argument on the question of such relief.

(2) Any action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and appeal shall be to the Supreme Court. Proceedings before the three judge court, as authorized by this subsection, shall take precedence on the docket over all other causes of action and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(3)(A) In any such proceeding the Secretary shall intervene for the purpose of presenting evidence and argument on the question of whether relief should be granted.

(B) The court, in its discretion, may permit any interested person residing in any affected State to intervene for the presentation of evidence and argument on the question of relief.

(4) The court, in view of the paramount interest of the United States in achieving ambient air quality necessary to protect the health of persons shall grant relief only if it determines such relief is essential to the public interest and the general welfare of the persons in such region, after finding—

(A) that substantial efforts have been made to protect the health of persons in such region; and

(B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to achieve compliance prior to the expiration of the period to attain an applicable standard; or

(C) that the failure to achieve such ambient air quality standard is caused by emissions from a Fed-

eral facility for which the President has granted an exemption pursuant to section 119 of this Act.

(5) The court, in granting such relief shall not extend the period established by this Act for more than one year and may grant renewals for additional one year periods only after the filing of a new petition with the court.

(6) The Secretary, in consultation with any affected State or States, shall take such action as may be necessary to modify any implementation plan or formulate any new implementation plan for the period of such extension.

(7) No extension granted pursuant to this section shall effect compliance with any emission requirement, timetable, schedule of compliance, or other element of any implementation plan unless such requirement, timetable, schedule of compliance, or other element of such plan is the subject of the specific order extending the time for compliance with such national ambient air quality standard.

SUPREME COURT OF THE UNITED STATES

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, ET AL.,
PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ORDER ALLOWING CERTIORARI—Filed October 15, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

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Supreme Court, U. S.
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No. 73-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, AND SUSANNE ALLSTROM,

Respondents.

MEMORANDUM IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents Natural Resources Defense Counsel, et al. (for convenience, "NRDC"), support the granting of a writ of certiorari, for the purpose of resolving a conflict among the circuits. In all other respects, the petition is without merit.

BACKGROUND

In enacting the Clean Air Amendments of 1970, Congress expressed its strong commitment to the goal of rapidly restoring the nation's air to healthful and en-

vironmentally beneficial quality. The new statute substantially altered the previously-prevailing distribution of responsibility for attacking this major health problem, markedly enlarging the supervisory role of the federal government over State and local efforts to abate pollution. This decision was not lightly taken. Through the 15 previous years, four separate federal statutes [1] had entrusted this task to the lower jurisdictions, without success. In 1970, the Congress found that, far from improving, "the air pollution problem is more severe, more pervasive, and growing at a more rapid rate" than before.[2]

It was thus obvious to the drafters of the 1970 legislation that a far stronger federal role was needed if the air was to become clean again. Hence large areas of regulation were exclusively entrusted to the federal EPA: for example, establishing emission standards for "new sources" of pollution, based upon the application of the best available technology (§ 111);[3] setting standards for sources of "hazardous pollutants" (§ 112); controlling automotive fuel additives (§ 211); and regulating emissions from new automobiles and other "mobile sources" (§ 202).

With respect to existing stationary sources of pollution, however, Congress chose not to discard totally the State and local programs that had developed under the previous legislation. Instead, the legislature undertook a creative exercise in federalism, building upon the existing organizational structure and expertise of the State

[1] Act of 1955, 69 Stat. 372 (1955); Clean Air Act of 1963, 77 Stat. 392 (1963); Amendments to the Clean Air Act, 79 Stat. 996 (1965); Clean Air Act of 1967, 81 Stat. 485 (1967).

[2] S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970) at 1.

[3] 42 U.S.C. § 1857c-6. Because the United States Code notation for the statute is quite clumsy, we hereafter adopt the original notation of the Act.

and local agencies, but allocating to EPA certain major functions to prevent inaction. The State and local agencies were to prepare and submit "Implementation Plans," binding themselves to a specific program of action designed to meet federally established standards for healthful air quality as expeditiously as practible, but (subject to the two exceptions discussed below) not later than mid-1975.[4] The object was, as the court below correctly noted, to ensure that ambitious commitments were undertaken by the States, in order to force the development of technology and the pace of administrative action. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, (decision below) *Pet. App.* at 22a.

In view of the States' previous failure to commit themselves energetically to the needed measures, however, the legislation sharply curtailed State and local autonomy even with respect to Implementation Plans. For example, though the States were to formulate Implementation Plans, EPA was instructed to exercise a powerful supervisory role. If a State Plan failed in any respect to meet the detailed statutory blueprint of § 110(a), EPA was to disapprove it and promulgate binding federal regulations to replace the offending portion. Consistent with the new scheme, the statute also sharply curtailed the States' power to defer the implementation of their Plans. Where the States had previously exercised the power to grant a variance (or its equivalent) from their control regulations whenever a polluter could meet vaguely specified and highly discretionary standards such as "hardship," the new law substituted two carefully drawn federal procedures—"extensions" (§ 110(e)) and "postponements" (§ 110(f)). Consistent with the Congress' determination that the restoration of healthful air quality

[4] § 110, 42 U.S.C. § 1857c-5. This section is reprinted, with the original notation, in Appendix C of Petitioner's Appendix at page 56a, *et seq.*

was so urgent it must take precedence over narrow economic interests, *NRDC, et al.*, v. *EPA*, (decision below) Point V (unchallenged in the instant petition for certiorari), *Pet. App.* at 48a *et seq.*; *NRDC, et al.*, v. *EPA*, 478 F.2d 875, at 888-9 (1st Cir., 1973), these two provisions limited the degree of flexibility and administrative discretion, while providing relief for genuine cases of inability to comply. Federal "extensions," of as much as two years, could be granted to a State or Air Quality Control Region in those few instances where, even with the application of all the available means to control pollution, an area was so polluted that healthful air quality could not be attained even by 1975. Likewise, in the unusual situation where a specific polluter could not meet the requirements of his State's Plan, the federal EPA could grant him immunity from the statute's penalties for up to one year at a time through a federal "postponement." In order to avoid the abuses associated with the State variance procedures, however, this federal variance provision was designed to force a formal demonstration, in a judicialized federal administrative hearing, that continued jeopardy of the public health was truly unavoidable, and that the continued operation of the offending source without penalty served an important public interest. Since the standard for obtaining a postponement was purposely stricter than that for obtaining State variances, the federal law pre-empted the existing State laws.

In August, 1971, the EPA Administrator promulgated regulations which were inconsistent with this provision, in that they purported to make the application of the federal postponement procedure discretionary with federal and State administrators, rather than mandatory as Congress had intended. 40 C.F.R. § 51.32(f) (formerly 42 C.F.R. § 420.32(f)). Under these regulations, a polluter would be required to seek a postponement rather

than a State or local variance only upon a finding by the State that the requested variance would prevent the attainment or maintenance of a National Air Quality Standard. When, in May of 1972, acting under this regulation, the Agency approved State Implementation Plans that would continue to authorize State variances in violation of § 110(f), NRDC, in conjunction with numerous local citizens and clean air organizations, petitioned for review of the approvals of a number of State Plans.[5]

Beginning with the First Circuit, four federal Courts of Appeals subsequently upheld these petitioners' contention that EPA had illegally attempted to impute discretion where none had been intended. All four agreed wholeheartedly that Congress had intended to pre-empt State variance procedures. They differed on only one point: the date on which pre-emption was to occur. The Fifth Circuit, agreeing with petitioners, held that the postponement procedure was intended to pre-empt State variance procedures immediately: that is, once EPA had approved a State Plan, a polluter could be insulated from attack for violating a part of it only if he obtained a federal postponement. The First Circuit, later followed by the Eighth and Second Circuits, held that pre-emption occurred as of the date set for attainment of the National Primary Standards (mid-1975 or earlier, except in those few cases where a State had sought and obtained an extension for attainment pursuant to § 110(e)).

EPA has since stated its agreement with the First Circuit position, though it has not, more than a year after the court's decision, rescinded its illegal regulation. Thus in petitioning this Court for a writ of certiorari, the

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[5] Because the statute's review provision, § 307 of the Clean Air Amendments, required a petition for review of a Plan approval to be brought in the "appropriate circuit," it appeared impossible to challenge the approvals of all deficient State variance statutes in one piece of litigation. Hence the same legal issue was brought before several federal Courts of Appeal.

Agency has presented the Court with the narrow issue of whether pre-emption has already occurred, or whether it will occur only at the attainment date.

THE WRIT SHOULD BE GRANTED

Respondents believe the Court should grant the writ, because it presents a conflict in the circuits that should be resolved. As noted previously, the Clean Air Amendments represent a major change in governmental policy towards pollution control, intended to place public health properly in the fore. The decision to pre-empt State variance laws, substituting a federal procedure designed to be more protective of public health, is one of the lynchpins of this effort to increase the pressure to restore healthful air quality as rapidly as possible. On such an important matter of public policy, this Court should take the opportunity to resolve the conflict over precisely when the more protective federal procedure becomes effective. Furthermore, the conflicting holdings reached by the different circuits, could, in a few instances, result in uneven treatment of the affected industries.

On the merits, the Fifth Circuit's decision is incontestably the more carefully reasoned and correct. It is grounded securely in the clear language of the statute, and in extensive legislative history that plainly establishes the Congressional intent to pre-empt entirely the State law variances. By contrast, the First Circuit's decision, which the petitioners charitably characterize as "solomonesque," *Pet. for Cert.* at 7, represents a compromise between the positions of NRDC and EPA that is not supported by either the statute or its legislative history. Obviously, this summary memorandum is not appropriate for a full explication of this point, but it suffices to say that the lower court was fully aware of the ambiguous snippet of floor debate claimed by the government to support its position, *Pet. for Cert.* at 14, correctly concluding that it was neither powerful nor persuasive when ranged against the plain language of the statute and overwhelming legislative history on the other side.[6] Likewise, the Fifth Circuit carefully considered, and repeatedly rejected, the claim that a decision in NRDC's favor would disrupt the administration of the federal program. This same claim was made before the First Circuit in opposition to the rule the Agency now says it is willing to embrace. The claim must be seen for what it is—an appeal to the lawless notion that the courts and the Congress have no power to redress illegal conduct undertaken by the executive branch.

CONCLUSION

On the basis of the foregoing, respondents urge that the Court grant the petition for certiorari, in order to resolve the conflict among the circuits.

Respectfully submitted,

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(Member of the Bar of the Supreme Court)

/s/ Richard E. Ayres
RICHARD E. AYRES

/s/ Ogden Doremus
OGDEN DOREMUS

Counsel for Respondents

July 8, 1974

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[6] The petitioner's suggestion that the quoted statement by Senator Muskie is the "only relevant legislative history" is simply and woefully in error.

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No. 73-1742

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1a–52a) is reported at 489 F. 2d 390.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1974 (Pet. App. B, 53a–54a). The petition for a writ of certiorari was filed on May 20, 1974, and was granted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Clean Air Act, as amended, the Environmental Protection Agency must disapprove provisions of a state implementation plan that authorize the state to grant variances from the state plan during the period prior to the Act's deadlines for attainment of national ambient air quality standards, where such variances comply with the provisions of the Act concerning "revisions" of plans rather than those concerning "postponements" of plan requirements.

STATUTE INVOLVED

The Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857, *et seq.*, are set forth in relevant part in Appendix C to the petition (Pet. App. 55a–64a).

STATEMENT

On April 30, 1971, as required by the Clean Air Amendments of 1970, 84 Stat. 1679, 42 U.S.C. 1857 c–4(a)(1), the Environmental Protection Agency ("EPA") promulgated nationally-applicable ambient air[1] quality standards for specified pollutants. Such standards are of two general types: "primary" standards, *i.e.*, those that in EPA's judgment are "requisite to protect the public health" (42 U.S.C. 1857c–4(b)(1)), and "secondary" standards, *i.e.*, those that in EPA's judgment are "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. 1857c–4(b)(2).

[1] Although not defined in the Act, "ambient air" means the portion of the atmosphere, external to buildings, to which the general public has access. See 40 C.F.R. 50.1(e).

On January 27, 1972, within the time prescribed by the Amendments (42 U.S.C. 1857c–5(a)(1)), the State of Georgia submitted to EPA its implementation plan. 40 C.F.R. 52.570(b). In accordance with EPA's guidelines for implementation plans (40 C.F.R. Part 51), the plan showed how Georgia will attain national primary and secondary ambient air quality standards within the statutory deadlines (the former as expeditiously as practicable, but in no case later than three years from the date of approval of the plan, and the latter within a reasonable time), and will maintain them thereafter, as required by 42 U.S.C. 1857c–5(a)(1) and (2)(A)(i)–(ii). On May 31, 1972, EPA approved Georgia's plan (with exceptions not here material). 37 Fed. Reg. 10859; 40 C.F.R. 52.572–52.574.

Within the time provided by the Amendments (42 U.S.C. 1857h–5(b)(1)), respondent Natural Resources Defense Council ("NRDC") and others petitioned the court of appeals for review of EPA's approval of the Georgia plan, claiming, *inter alia*, that the approval was invalid because a Georgia statute included in the plan (Ga. Code Ann. 88–912)[2] em-

[2] Section 88–912 reads in full:

"The department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappro-

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powered the State Department of Public Health to grant variances from the plan in a manner contrary to the requirements of Section 110(f) of the Act, 42 U.S.C. 1857c-5(f).

That section permits EPA, in accordance with specified procedures, to approve postponements of the applicability of requirements of a plan to a particular stationary source or class of moving sources for up to

priate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the director of the department. The director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the director is for the granting of a variance, the department may do so without a hearing: Provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the department a written request for such notification."

one year upon application of the governor. The court of appeals agreed with respondents and rejected EPA's contention that, during the period prior to the deadline for attainment of national primary standards (July 1975 for Georgia[3]), variances are not necessarily subject to Section 110(f) and rather may properly be treated as "revisions" of the plan, subject to EPA's approval under the less formal procedures of Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3), where such variances would not interfere with timely attainment of the standards.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ultimate issue in this case is whether a request for a variance[4] from a state's plan to implement air quality standards under the Clean Air Amendments of 1970 during the period prior to the state's deadline for the attainment of such standards is subject exclusively to the provisions of the Act concerning "postponements," as the court of appeals held, or whether EPA has properly construed the Act as permitting it to treat such variances as "revisions" of plans.

Under the revision procedures, the state is required to hold a public hearing, EPA may grant approval if the variance would not prevent timely attainment of

[3] The three-year period began to run in July 1972, when EPA approved, after revisions, the portions of Georgia plan that it had initially disapproved.

[4] We use the term "variance" generically to cover any postponement, amelioration, conditional permit, or other modification of an emission standard, compliance schedule, or other element of a state's implementation plan.

national standards, and its action is subject to judicial review. Under the postponement procedures, EPA itself must hold formal public hearings, it may approve a postponement (for up to one year) even if it would interfere with timely attainment of standards, but only if other specified conditions are satisfied, and its action is subject to judicial review.

While the question presented in this case involves construction of statutory language, that language should be construed in light of the background of the Clear Air Amendments and with an awareness of the complex structure of the Clean Air Act created by them—an Act designed to implement important national policy goals within a context of cooperative federalism.

1. The role of the federal government in efforts to control air pollution has grown steadily over the past two decades through a series of measured steps that reflect certain inherent dimensions of the problem. These include: its interstate nature, polluted air being mobile and not confinable within the boundaries of a state; the advantage, in terms of availability of resources and avoidance of duplication, of having certain actions taken on the national level; the practical desirability of leaving both the adaptation of general standards to particular circumstances and the enforcement of measures adopted to achieve such goals to state and local governments, whose personnel are ordinarily closer to the physical sources of pollution and those affected by it and by the measures needed to reduce it; and the desirability, in our federal system, of avoiding where possible an extensive federal law enforcement apparatus.

Thus, in 1955, Congress authorized the Surgeon General, under the supervision of the Secretary of Health, Education, and Welfare ("the Secretary"), to study the problem of air pollution, to provide technical assistance (*e.g.*, investigations, research, surveys) to state and local governments trying to abate pollution, and to make grants-in-aid for research, training and demonstration projects. 69 Stat. 322–323. In 1960, Congress directed the Surgeon General to conduct a study concerning the health hazards resulting from motor vehicle emissions. 74 Stat. 162.

In the Clean Air Act of 1963, 77 Stat. 392–401, Congress authorized the Secretary to expand research concerning air pollution and to work with the states to develop uniform laws to prevent and control such pollution. Although federal authorities were empowered to intervene directly to abate interstate pollution in limited circumstances (77 Stat. 396–399), the Act explicitly left the primary responsibility in this field with state and local governments. Congress amended the 1963 Act in adopting the Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992–996, which authorized the Secretary to establish federal standards to control motor vehicle emissions, and again in 1966 to increase the Secretary's authority to make grants to state air pollution control agencies. 80 Stat. 954–955.

Convinced "that air pollution is a threat to the health and well being of the American people" (H.

Rep. No. 728, 90th Cong., 1st Sess., p. 3), Congress enacted a still more comprehensive statute, the Air Quality Act of 1967. 81 Stat. 485–507. This law reiterated the congressional premise of the Clean Air Act "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *." 81 Stat. 485, 42 U.S.C. 1857(a)(3). Accordingly, while the Secretary was required to designate air quality control regions and to issue criteria of air quality required to protect the public health and welfare, the states were given the responsibility to adopt ambient air quality standards for those regions, as well as to adopt implementation plans to maintain and enforce their standards. State standards and plans both had to be approved by the Secretary, who, if a state failed to comply, could promulgate federal standards and plans for that state. Where action reasonably calculated to secure abatement of violations of the air quality standards was not taken, the Secretary could, if the health or welfare of persons in another state (or, in some circumstances, another country) was endangered, request the Attorney General to bring suit to abate the pollution source. 81 Stat. 490–497.

2. Dissatisfied with the rate of progress under the 1967 Act,[5] and responding to heightened concern about

[5] By 1970, only ten state standards had been approved, and, while state implementation plans had been submitted to the Secretary, none had yet been approved. As a result, there had been no federal enforcement under the 1967 Act and only one enforcement action litigated since 1963. 116 Cong. Rec. 32914–32916; see *United States* v. *Bishop Processing Co.*, 423 F. 2d 469 (C.A. 4), certiorari denied, 398 U.S. 904.

air pollution and other environmental problems, Congress substantially revised the Clean Air Act in enacting the Clean Air Amendments of 1970. 84 Stat. 1676. A fundamental feature of the Amendments was the adoption of fixed deadlines for the accomplishment of specified statutory objectives concerning air quality throughout the country, although the states were accorded substantial latitude in devising strategies for meeting the statutory goals in accordance with a timetable established by the Amendments, subject to guidelines adopted and implemented by EPA.[6]

More specifically, the pertinent features of the Amendments are as follows. First, based upon air quality criteria already adopted pursuant to the 1967 Act or subsequently adopted, EPA was ordered, within 30 days of the enactment of the Amendments on December 31, 1970, to publish proposed regulations prescribing national "primary" and "secondary" ambient air quality standards (see p. 2, *supra*); after 90 days for comments, EPA was then obliged to promulgate such standards. 42 U.S.C. 1857c–4(a)(1). Second, after EPA's promulgation of standards, each state was required, after public hearings, to adopt and submit to EPA a plan for the implementation, maintenance and enforcement of these national

[6] While a House-Senate conference committee was resolving differences between bills passed by the respective houses, the President created EPA and vested in it the powers and responsibilities of the Secretary under the Clean Air Act and other legislation. Reorganization Plan No. 3 of 1970. (35 Fed. Reg. 15623), 84 Stat. 2086. Accordingly, the amendments vested enforcement authority in the Administrator of EPA. See H. Conf. Rep. No. 91–1783, 91st Cong., 2d Sess., p. 42.

standards. 42 U.S.C. 1857c–5(a)(1). Third, EPA was required, within four months of submission, either to approve or disapprove each state implementation plan. 42 U.S.C. 1857c–5(a)(2).[7]

The Amendments list eight conditions that EPA must find satisfied before it may approve a plan. One requirement is that the state's implementation plan provide for attaining the primary national ambient air quality standard "as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan," unless EPA, upon application of the Governor made when the plan was submitted, extends this time for not more than two years (42 U.S.C. 1857c–5(a)(2)(A)(i) and (e)); secondary standards must be attained within a "reasonable" time. 42 U.S.C. 1857c–5(a)(2)(A)(ii). A further requirement is that the plan include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard * * *." 42 U.S.C. 1857c–5(a)(2)(B).

In addition, Section 110(a)(3) authorizes EPA to approve "revisions" in state implementation plans so long as they conform to the requirements of the Act for the plans themselves. 42 U.S.C. 1857c–5(a)(3). Beyond the authority to approve revisions, Section 110(f) empowered EPA under specified circumstances

[7] If a state declines to submit a plan or to revise its plan to the extent that it has been disapproved, EPA is authorized to prepare and promulgate such a plan or portion thereof. 42 U.S.C. 1857c–5(c).

to "postpone" any requirement of an implementation plan "[p]rior to the date on which any stationary source or class of moving sources is required to comply * * *." 42 U.S.C. 1857c–5(f)(1). Revisions and postponements both require EPA's approval, which is subject to judicial review (42 U.S.C. 1857c–5(f)(2)(B), 1857h–5(b)(1)), and both must be preceded by the opportunity for a public hearing, to be conducted by the state in the case of a revision and by EPA in the case of a postponement. The Act specifically requires that the latter type of determination be made on the record, based on a fair evaluation of the entire record at the hearing, and that it include detailed findings and conclusions. 42 U.S.C. 1857c–5(f)(2)(A).

3. In substantially revising the approach to be taken by the federal government and the states in combating together the problem of air pollution, the Clean Air Amendments of 1970 thus imposed on newly-created EPA and the states, under a complex statutory scheme, a variety of substantial obligations to be met within specified deadlines. One of the many issues EPA was required to resolve at the outset concerned the procedures to be followed if a state chose to make some or all of the general requirements of its implementation plan more stringent than the standards required, or to make them effective prior to the statutory deadline for attainment of national ambient air quality standards, but also desired to authorize variances that would not interfere with the state's timely attainment of those standards. EPA concluded that such revisions could be treated as "revisions" of plans

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under Section 110(a)(3) of the Act, while variances that would affect attainment or maintenance of national standards by or after the deadline would be treated as "postponements" under Section 110(f).

Accordingly, when EPA promulgated guidelines for the preparation of state implementation plans in 1971, it took the position, with the concurrence of NRDC (see p. 31, *infra*), that Section 110(f) of the Act did not apply exclusively to all exceptions or variances, but only to those that would affect the ability of a state to attain within the statutory timetable, and thereafter maintain, the national standards; variances that would not have such an effect were to be treated as revisions under Section 110(a)(3). 36 Fed. Reg. 22400, 22405; 40 C.F.R. 51.6, 51.32(f).

Relying on EPA's authoritative interpretation of the Act concerning variances, Georgia and other states adopted implementation plans effective immediately or well before the deadlines for attainment of national standards, with the intention of granting variances or exceptions to specific sources that could not feasibly be brought into immediate compliance. These states proposed to defer applicability only where necessary, by placing excepted sources on expeditious but reasonable compliance schedules which would provide for attainment of the national standards by the mandatory compliance date, which for Georgia is July 1975 for both primary and secondary standards. Other states, such as Florida, made their requirements effective at the latest possible date allowed by the Clean Air Act—generally mid-1975.

Such states would therefore normally have no need to grant variances prior to the mandatory compliance dates.

4. In review proceedings initiated by respondent NRDC, the Courts of Appeals for the First [8] and Eighth [9] Circuits (later joined by the Second [10] and Ninth)[11] held that EPA had properly construed Section 110 as authorizing it to treat some variances other than as postponements under Section 110(f), at least insofar as the variance pertained to the period prior to the deadline for attainment of the national standards. Most of these courts also held, however, that a variance pertaining to the post-attainment period was, with limited exceptions, subject to the procedures pertaining to postponements, even if the particular variance did not threaten the state's ability to attain and maintain national standards.

Accepting the distinction drawn by the courts between pre-deadline and post-deadline variances as a reasonable interpretation of the Act, albeit less desirable than its own interpretation, EPA amended its guidelines to reflect this distinction and to conform with the rulings in those cases concerning the pre-

[8] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F. 2d 875 (C.A. 1).

[9] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F. 2d 690 (C.A. 8).

[10] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F. 2d 519 (C.A. 2).

[11] *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-2145 (C.A. 9), decided November 11, 1974.

attainment period. 39 Fed. Reg. 34533–34535; 40 C.F.R. 51.11(g), 51.15(d), 51.32(f).[12]

5. In the present case the court of appeals disagreed with the other circuits and concluded (Pet. App. 25a–27a):

> We are unable to agree that the statute envisions granting the states the kind of "flexibility" during the "pre-attainment period" which provisions like Georgia's section 88–912 would afford. The parts of the statute on which the First Circuit relied were the provision of section 1857c–5(a)(2)(A)(i) that primary standards had to be met, not immediately, but only "as expeditiously as practicable", but in no case later than three years from the adoption of the state plan, and the provision of section 1857c–5(e) for a possible two-year extension of the deadline in sharply restricted circumstances. The First Circuit said that "[t]he provision for a three-year grace period, followed by the possibility of a further two-year extension, indicates that Congress did not expect immediate achievement *of standards.*" 478 F. 2d at 887 (emphasis supplied).
>
> This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of

[12] At the same time, EPA disapproved *pro tanto* all provisions of plans, including the Georgia plan, that permitted variances to defer compliance beyond the deadlines for attainment of national standards. 39 Fed. Reg. 34535; 40 C.F.R. 52.26.

> *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived. We think that the provisions of section 1857c–5(a)(2)(A)(i) and section 1857c–5(e) do not provide *any* support for the latter conclusion. Nor do we find any support for that conclusion anywhere in the statute. Instead we find that the statute as a whole supports the general view of its overall strategy we articulated above: that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need. That view precludes the conclusion that Congress intended the states to have the kind of "flexibility" state variance plans would give them.
>
> Thus we hold that it was inconsistent with the statute for Georgia to adopt its own variance procedures, and that the Administrator exceeded his authority in approving section 88–912. Accordingly, we direct the Administrator to publish forthwith his disapproval of section 88–912.

6. It is our submission that the court of appeals' decision rests upon a misreading of the statutory language and its history, and a misapprehension of the structure and purposes of the Clean Air Act. In providing EPA in Section 110(f) with authority to postpone deadlines in accordance with burdensome and relatively stringent statutory requirements, Congress

was plainly concerned with providing a limited means for dealing with sources unable to comply with the requirements of state plans by the deadlines for attainment of national standards. That, of course, does not mean that Section 110(f) should be construed as providing the only means for relief from any requirement of a state plan at any time, even if the general requirement had been made more stringent, or effective sooner, than was needed to attain such standards. To the contrary, such a reading, if adopted by EPA at the outset, would very likely have resulted overall in less ambitious requirements and commitments than many states adopted or required.

The principal conclusion of the court of appeals that, as contended by NRDC, Section 110(f) provides the exclusive means for obtaining variances from requirements of a state plan prior to the deadline for attainment, has now been rejected by the other four courts of appeals that have considered the question. Those courts have recognized the need and authority under the Act for a measure of flexibility not afforded by the postponement procedures of Section 110(f), particularly in the pre-attainment period. Indeed, all of the other courts of appeals have, albeit to differing degrees, acknowledged some variance authority apart from Section 110(f) in the post-attainment period.

7. If sustained, the decision below would have severe adverse consequences for EPA in its efforts to administer and enforce effectively its manifold statutory responsibilities. One possibility is that EPA would itself be required to hold formal public hearings concerning many of the thousands of variances already granted by states—after public hearings held by the state—and approved by EPA. In addition, invalidation of EPA's 1971 interpretation of the Act at this time would be seriously unfair to the states and other persons subject to the Act who have relied in good faith on that interpretation—once endorsed by NRDC itself (see p. 31, *infra*) in formulating and responding to control strategies.

ARGUMENT

VARIANCES FROM STATE IMPLEMENTATION PLANS THAT DO NOT AFFECT ATTAINMENT OF NATIONAL STANDARDS WITHIN THE STATUTORY DEADLINES OR THEIR MAINTENANCE THEREAFTER NEED NOT BE TREATED BY EPA AS "POSTPONEMENTS" OF THE REQUIREMENTS OF STATE PLANS.

The decision of the court of appeals in this case set aside a reasonable construction of the Clean Air Amendments made by the agency responsible for implementing the Amendments and sustained by all other courts of appeals that have considered the question, *viz.*, that the provisions of Section 110 (f) of the Act concerning postponements are not the sole means by which a state may grant a variance from the requirements of its implementation plan. That decision is not compelled or supported by the language of the Amendments or their legislative history, or by the overall structure and purpose of the Clean Air Act. Moreover, the court of appeals' construction of the Amendments would have unwarranted adverse con-

sequences for EPA, the states, and the persons subject to the Act.

A. EPA'S TREATMENT OF VARIANCES NOT AFFECTING ATTAINMENT OF AIR QUALITY STANDARDS WITHIN THE PRESCRIBED DEADLINE AS NOT BEING GOVERNED EXCLUSIVELY BY SECTION 110(F) IS CONSISTENT WITH THE LANGUAGE, STRUCTURE AND LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS

Under the statutory scheme created by the Clean Air Amendments, within nine months after EPA's promulgation of primary and secondary national ambient air quality standards (*i.e.*, by January 31, 1972), each state, after holding public hearings, was required to submit to EPA a plan providing for the implementation, maintenance, and enforcement of such standards in the state. EPA was required by Section 110 (a)(2) to approve each state plan within four months of the deadline for submission if it had been adopted after public hearings and if it satisfied eight general conditions. The first condition was that the plan provide for the attainment of the national primary ambient air quality standards it was implementing "as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan," and for the attainment of secondary standards within "a reasonable time." 42 U.S.C. 1857c–5(a)(2)(A) (i) and (ii). Other conditions require that the plan include specified categories of control measures (*e.g.*, emissions limitations, compliance schedules) and procedures (*e.g.*, provisions for intergovernmental cooperation; reports on emissions; revisions to take account of changes in the national standards). 42 U.S.C. 1857c–5(a)(2)(B)–(H).[13]

[13] Section 110(a)(2) provides that EPA shall not approve a plan unless:

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such re-

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The Amendments provided three means to alter deadlines imposed by Section 110 or a plan promulgated thereunder. If it appeared at the outset that certain sources would not be able to comply with the requirements of a plan to meet a primary standard within the three-year period, the Governor of a state could request when submitting an implementation plan, and EPA was authorized to grant, an extension of the statutory deadline for up to two years for such sources, in accordance with the requirements of Section 110(e).[14] Georgia sought no such extension, and that provision is not in issue in this case.

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ports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303 [42 U.S.C. 1857h–1], and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements."

[14] Section 110(e) authorizes EPA to approve an extension if it determines that (42 U.S.C. 1857c-5(e)):

* * * * * * *

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not

Second, the state is authorized to make "revisions" in compliance schedules or any other aspect of an approved implementation plan, and, under Section 110(a)(3), EPA is authorized to approve such revisions if they have been adopted by the state after public hearings and they meet the requirements of Section 110(a)(2) for implementation plans themselves, including, of course, the requirement of attaining national standards within the pertinent deadlines. 42 U.S.C. 1857c–5(a)(3). EPA's approval of an implementation plan is explicitly made subject to judicial review in a court of appeals by a provision (42 U.S.C. 1857h–5(b)(1)) which EPA regards as equally applicable to its approval of revisions of plans.

Third, prior to the date on which any stationary source or class of moving source is required to comply with a requirement of an implementation plan, the Governor may apply for, and EPA may grant, a "postponement" of such deadline under Section 110

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available or will not be available soon enough to permit compliance within such three-year period, and

(B) The State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved [and]

(2) * * * the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f), 42 U.S.C. 1857c–5(f). While the Act does not require that the state afford an opportunity for a public hearing before requesting a postponement, as it must with a revision of a plan, Section 110(f) does require that EPA itself hold a formal public hearing, and that its decision be based on the record of that hearing and be accompanied by detailed findings and conclusions. 42 U.S.C. 1857c–5(f)(2)(A). Moreover, although the decision to grant a postponement, unlike a revision, is not subject to the three-year deadline and other requirements of Section 110(a)(2) pertaining to implementation plans, postponements are subject to several conditions[15] similar to those pertaining to requests for extension of the three-year deadline under Section 110(e) (see pp. 20–21, *supra*, n. 14), and a postponement may be granted "for not more than one year." 42 U.S.C. 1857c–5(f)(1). The decision to grant a postponement is also subject to judicial review in a court of appeals. 42 U.S.C. 1857c–5(f)(2)(B).

[15] Under 42 U.S.C. 1857c–5(f)(1), EPA is required to approve a postponement if it determines that:

> (A) good faith efforts have been made to comply with such requirement before such date, (B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time, (C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and (D) the continued operation of such source is essential to national security or to the public health or welfare * * *.

The legislative history of the Clean Air Amendments provides limited but useful guidance in applying the pertinent provisions of this complex legislation to the present issue. Briefly, the Senate had passed a bill far more rigorous than the bill earlier passed by the House, and the conference committee produced in the waning days of the 91st Congress a compromise bill that differed in many substantial respects from either the Senate or House bill, while giving only a relatively truncated explanation of the new bill.

The House-passed bill (H.R. 17255, 91st Cong., 2d Sess.; H. Rep. No. 91–1146, 91st Cong., 2d Sess.) adhered rather closely to the then-existing provisions of the Clean Air Act as amended by the Air Quality Act of 1967 (see p. 8, *supra*). Most significantly, the bill did not establish a fixed deadline for attaining national ambient air quality standards promulgated by the Secretary,[16] and so had no pertinent provisions for extensions, revisions or postponements of deadlines.[17]

Section 110 of the Senate bill (S. 4358, 91st Cong., 2d Sess.; S. Rep. No. 91–1196, 91st Cong., 2d Sess.), passed by the Senate as an amendment to the House bill, provided for the promulgation within 30 days of national ambient air quality "standards" concerning

[16] EPA had not yet been created (see p. 9, *supra*, n. 6).

[17] Under the House bill, the Secretary was required to issue proposed national ambient air quality standards within 30 days and to promulgate such standards within a "reasonable time" after receiving comments on the proposals. States were required to submit implementation plans within 240 days of promulgation of the standards, but the plan need only have assured achievement of the standards "within a reasonable time."

health of persons and "goals" concerning public health and welfare (corresponding generally to primary and secondary standards under the final amendments). Under Section 111 of the Senate bill, each state was required within nine months thereafter to submit an implementation plan, which the Secretary was required to approve within four months if the plan satisfied ten specified conditions, including a requirement that it provide for the attainment of national standards within three years (there being no requirement to attempt to attain such standards sooner if practicable).

The bill did not provide for extension of the three-year deadline for attaining national "standards," although it did authorize the Secretary, where he determined it to be necessary, to extend the deadline for submission of a plan to implement national "goals" for up to eighteen months. The bill contained no counterpart to Section 110(a)(3) authorizing EPA to approve revisions in approved plans.[18]

Section 111(f) of the Senate bill, however, did provide that no later than one year before the deadline for attainment of a national standard the Governor of a state could petition a three-judge district court for relief from the expiration of the deadline as to a region or persons, and the court would be authorized to grant such relief, for up to one year, only if specified conditions were satisfied, which conditions were similar to those now contained in Section 110(f) (see

[18] Section 111(a)(2)(I) of the bill contained limited authority for revisions to take account of changes in the standards or goals promulgated by the Secretary or of changes in the availability of methods for attaining them.

p. 22, *infra*, n. 15).[19] See also S. Rep. No. 91-1196, *supra*, at pp. 14–15.

The conference report (H. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess.), after summarizing the respective provisions of the House bill and the Senate amendment thereto, stated (*id.* at 45):

> The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards but leaves the States free to establish a reasonable time period within which secondary ambient air quality standards will be implemented. The conference substitute modifies the Senate amendment in that it allows the Administrator to grant extensions for good causes shown upon application by the Governors.

[19] The court was authorized to grant a postponement only after (1) determining that such a relief is essential to the public interest and the general welfare of the persons in the region affected, and (2) finding

> (A) that substantial efforts have been made to protect the health of persons in such region; and
>
> (B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to achieve compliance prior to the expiration of the period to attain an applicable standard; or
>
> (C) that the failure to achieve such ambient air quality standard is caused by emissions from a Federal facility for which the President has granted an exemption pursuant to section 118 of this Act.

Section 118 of the bill, like Section 118 of the Act, 42 U.S.C. 1857f, authorized the President to exempt Federal properties from compliance with certain requirements of the Act if he determined it "to be in the paramount interest of the United States to do so."

To this brief explanation, Senator Muskie, the primary author of the Senate bill, added the following comments in a Summary of the Provisions of Conference Agreement on the Clean Air Amendments of 1970 (116 Cong. Rec. 42384–42385; emphasis supplied):

> If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of *the deadline* up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension.
>
> A Governor may also apply for a postponement of *the deadline* if, when *the deadline* approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such postponement is subject to judicial review.

Neither the conference report nor Senator Muskie's Summary discussed the addition of Section 110(a)(3).

In sum, the language of the Amendments and their history strongly suggest that Section 110(f) was not intended to be the exclusive means of obtaining variances from a requirement of a state plan where the variance woud not affect timely attainment or maintenance of national ambient air quality standards. Rather, Section 110(f) was aimed at post-

ponements that would affect a state's attainment of national standards within the prescribed deadlines; lesser variances, like other revisions of plans, could be approved by EPA pursuant to Section 110(a)(3).

B. EPA'S CONSTRUCTION OF THE ACT, ON WHICH THE STATES AND PERSONS SUBJECT TO THE ACT HAVE RELIED, PROPERLY EFFECTUATES THE LEGISLATIVE PURPOSE OF THE AMENDMENTS.

The Clean Air Amendments imposed upon newly-created EPA an ambitious legislative goal, a variety of substantial legal and technical obligations, and an unprecedented series of deadlines to meet in carrying out its statutory mandate under this comprehensive and complex legislation. While it was completing the first phase—promulgation of national air quality standards on April 30, 1971—EPA was also working towards the next stage—submission of state implementation plans. To assist the states in determining what it would regard as satisfying the requirements of Section 110(a)(2), in the spirit of cooperative federalism on which the Act is still based (42 U.S.C. 1857(a) (3) and (4)), EPA on April 7, 1971, published proposed guidelines for the preparation, adoption and submission of such plans. 36 Fed. Reg. 6680. After receiving comments by numerous organizations, including respondent NRDC, EPA issued final guidelines on August 14, 1971. 36 Fed. Reg. 15486; 40 C.F.R. Part 51.

One of the many questions of statutory interpretation to be resolved during the period in which the implementation plans had to be prepared, submitted and approved concerned the scope and relationship of

EPA's authority to approve "revisions" of plans under Section 110(a)(3) and "postponements" under Section 110(f), particularly as they related to compliance with control measures made effective prior to the deadline for attainment of national standards.

In light of the legislative history of Section 110(f), which indicated that it was aimed primarily at requests for relief arising after a plan was submitted that would affect attainment of the national standards within the three-year deadline,[20] EPA concluded that Section 110(f) had not been intended by Congress as the exclusive means of relief from requirements of plans when the compliance problems involved had not been accommodated by an extension of the deadline pursuant to Section 110(e) and would not prejudice the state's timely attainment of the standards. This conclusion is supported by several pragmatic considerations.

First, since Section 110(f) requires that formal hearings be held by EPA (cf. 38 Fed. Reg. 22025–22030, 27286–27287; 40 C.F.R. 51.33), in addition to any hearings held by the state, an overly-broad application of the postponement procedure could result in an enormous burden upon EPA, with consequent delays and diversion of resources needed for other vital

[20] In the original Senate bill the postponement provision explicitly applied only to the statutory deadline for attainment of national standards (see p. 24, *supra*), and the comments in the conference report and Senator Muskie's explanation of the conference bill do not suggest a substantially broader focus (see pp. 25–26, *supra*). See Luneburg, *Federal-State Interaction under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 656 (1973).

aspects of EPA's work under the Act. Insofar as requests for relief were subject to the "revision" requirements, however, the burden of conducting public hearings was diffused among the affected states.

In addition, if a state were authorized to grant variances from the requirements of its plan prior to the statutory deadline only by resort to the postponement procedures of Section 110(f), it might well be inclined to defer the effective dates of its control measures until the latest feasible date consistent with attainment of the standards within the statutory deadline, rather than to make some or all control measures effective soon in the expectation that needed variances could be granted during the period prior to the deadline. Such a decision by a state to defer deadlines might reflect apprehension that the postponement procedures would be too slow and stringent to provide adequate relief during the preattainment period, as well as the belief that a postponement could be granted only for one year[21] and so could not adequately protect a source subject to a requirement made effective

[21] While the issue is not presented in this case, a question exists as to whether Section 110(f) permits only one postponement, since the Act does not explicitly authorize or prohibit successive postponements. The provision of the Senate bill on which Section 110(f) was largely based did explicitly permit multiple postponements of the deadline for attainment of a standard, but the omission of this seemingly significant language was not commented on in the conference report or the explanatory statement submitted by Senator Muskie (see pp. 25–26, *supra*).

at a date earlier than one year before the statutory deadline.[22]

Similarly, if Section 110(f) were the only means for obtaining variances from any requirement of a state plan, the states might be deterred from adopting control strategies more stringent than those needed merely to attain and maintain national standards, which Section 116 of the Act specifically permits them to do. 42 U.S.C. 1857d–1.

Accordingly, in light of the statutory mandate that the national standards should be attained "as expeditiously as practicable" within the three-year deadline, EPA adopted a construction of the Amendments that reasonably led towards that goal. Thus, EPA's proposed and final guidelines provided that a state's determination to defer the applicability of any portion of its control strategy in its plan to a source would be subject to the requirements for a postponement if the "deferral will prevent attainment or maintenance of a national standard" within the prescribed time (36 Fed. Reg. 6686, 22405; 40 C.F.R. 51.32(f)), although

[22] For example, Georgia and other states (see, *e.g.*, Pet. 6) made many requirements of their plans effective immediately in 1972, subject to relief under stringent variance procedures. This way most sources were subjected to controls long before the 1975 deadline, even though, as was recognized at the outset, some might require variances for most or all of the three-year period. A one-year postponement would not always help such a source, even if available, as the source might then be in violation for the balance of the three-year period. This problem would have been avoided if the state had deferred the effective date of all requirements under the plan until the attainment deadline (as Florida and others have done), thereby in effect basing overall controls on the lowest common denominator.

such a determination would be treated as a "revision" of the plan if it would not have that effect. See 36 Fed. Reg. 6681, 22400; 40 C.F.R. 51.6.

Neither respondent NRDC nor anyone else objected to this provision. Indeed, at subsequent congressional hearings concerning EPA's implementation of the Clean Air Amendments, held before EPA had approved the state plans, NRDC stated that Section 110(f) applied to "any variance which would prevent attainment * * * of a national standard * * *" and that the EPA guideline "correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of the plan * * *." Hearings, on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I), before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., ser. no. 92–H31, p. 45 and n.51 (statement of Richard E. Ayres).

On the basis of EPA's then-unchallenged guidelines, Georgia and other states submitted implementation plans containing early effective dates and limited provision for variances. Such plans were approved by EPA in this regard—in many instances without challenge—and commitments and investments have been made by various sources in such states, and the states themselves, in reliance upon EPA's interpretation of the Act as permitting variances during the pre-attainment period subject to the procedures for "revisions" of plans.

Where, as here, EPA's interpretation of the "untried and new" provisions of the Amendments it was responsible for implementing "is not unreasonable," the language of the statute bears EPA's construction, that interpretation has "been a matter of public record," and there has been action by others, "at very great expense, in reliance upon the * * * interpretation," it should be shown "great deference" and sustained. *Udall* v. *Tallman,* 380 U.S. 1, 16–18; see, *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433–434; *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205, 210.

C. THE CONTENTION THAT SECTION 110(F) PROVIDES THE EXCLUSIVE MEANS FOR OBTAINING VARIANCES PRIOR TO THE DEADLINE FOR ATTAINING NATIONAL STANDARDS HAS BEEN REJECTED BY CONGRESS AND ALL OTHER COURTS OF APPEALS

The reasonableness of EPA's interpretation of the Act concerning the treatment of variances, and the validity of EPA's approval of the Georgia procedure in issue here, are both supported by the unsuccessful efforts of respondent NRDC to challenge them elsewhere.

At congressional hearings in 1972 concerning EPA's implementation of the Clean Air Amendments, NRDC specifically singled out the Georgia variance statute involved here as being an "extreme" example of provisions in state plans that NRDC believed to be inconsistent with the requirements of Section 110(a)(2). Hearings on Implementation, *supra,* at 45. Congress, however, took no action, either before or after EPA's approval of the Georgia plan, that would in

any way suggest that Georgia or EPA was not correctly carrying out the intent of Congress.

Moreover, after EPA had approved a number of state plans containing provisions for variances that, consistent with EPA's guidelines, need not in all cases satisfy the requirements of Section 110(f) for postponements, respondent NRDC challenged EPA's approvals of several such plans on various grounds. Apparently having changed its position (see p. 31, *supra*), NRDC contended that Section 110(f) "establishes the exclusive variance procedure." *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 478 F. 2d 875, 884 (C.A. 1) (*"NRDC–C.A. 1"*). However, four of the five courts of appeals that have considered that claim have rejected it.

In *NRDC–C.A. 1,* involving challenges to EPA's approval of the Massachusetts and Rhode Island plans, the First Circuit concluded that "Congress [had not] intended altogether to preclude the Administrator [of EPA] from approving plans containing reasonable state deferral mechanisms during the preliminary [pre-attainment deadline] period." *Id.* at 887. The court stated (*ibid.*):

> A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c–5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the "as expeditiously as practicable" language § 1857c–5(a)

> (2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.

While not rejecting EPA's contention that such power was conferred by the revision authority of Section 110(a)(3), the court viewed "it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period." *Ibid.*

As to the period *after* the deadline for attainment of national standards, however, the court concluded that a variance would ordinarily have to satisfy the requirements of Section 110(f) for postponements, which the court regarded as "the exclusive mechanism for hardship relief after the mandatory attainment dates." 478 F. 2d at 886. Nevertheless, recognizing a need for "flexibility" not afforded by Section 110(f) for such matters as "mechanical breakdowns and acts of God," the court added that a state plan may provide "for minor state and local deferral procedures" during the post-attainment period, if limited to a few months and containing standards and controls to preclude abuse. *Ibid.*[23]

[23] Since the Court granted certiorari in the present case, the Ninth Circuit has more broadly upheld EPA's interpretation of the Act, as reflected in the guidelines, that all variances need not satisfy the requirements of Section 110(f) for postponements. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-2145 (C.A. 9), decided November 11, 1974. That court specifically rejected the distinction drawn by the First Circuit between the periods prior to and after

Regarding the First Circuit's construction of the Act as a reasonable, workable one, albeit less desirable

the deadlines for attainment of national standards as having no foundation in the language of Section 110 or its history (see Comment, *Variance Procedures under the Clean Air Act: The Need for Flexibility*, 15 Wm. & M.L. Rev. 324, 331 (1973)), and concluded that the power of EPA to approve "minor" variances (*i.e.*, those that will not interfere with attainment or maintenance of national standards), is a necessary adjunct of the statutory scheme both before and after the attainment dates, without reliance upon the revision authority of Section 110(a)(3).

Moreover, the First Circuit's contrary conclusion is not supported by the legislative history on which it relied in stating (478 F. 2d at 885-886):

> It is plain from the legislative history that the expeditious imposition of "specific emission standards" and their "effective enforcement" were primary goals of the Clean Air Amendments. Report No. 91-1146, U.S. House of Representatives, 91st Cong. 2d Sess., pp. 1, 5 (1970) * * * The Congressional intent could too easily be frustrated by the existence of open-ended exceptions. Sources of pollutants should either meet the standard of the law, or be closed down. Report No. 91-1196, U.S. Senate, 91st Cong. 2d Sess., p. 3 (1970).

The House report cited was commenting upon the House bill which, as noted (see p. 23, *supra*), did not contain explicit mandatory deadlines for attainment of emission standards or ambient air standards; nor did the House report indicate that "specific emission standards" could not be relaxed by joint federal-state action even where there would be no adverse affect upon attainment or maintenance of national ambient air standards. Similarly, the Senate report did not suggest that sources must close down if they cannot meet the *emission* standards or other elements of a state's control strategy. Rather, the report's statement that the sources "either should meet the standard of the law or be closed down * * *" (S. Rep. No. 91-1196, *supra*, at 3) plainly has reference to the ambient air standards the report had just been discussing. *Id.* at 2-3. Nothing in the legislative history is inconsistent with the proposition that the variances from requirements of a state

than EPA's original construction, EPA did not ask this Court to review the First Circuit's decision and instead changed its regulations concerning the plans involved to conform to that decision. See 38 Fed. Reg. 18878–18880; 40 C.F.R. 52.1131, 52.2079. Later, EPA's general guidelines were themselves changed to reflect this interpretation, and EPA disapproved all state plans to the extent that they "permit the deferral of compliance with applicable plan requirements beyond the statutory attainment dates * * *." 39 Fed. Reg. 34535; 40 C.F.R. 52.26(a).

The First Circuit's decision was followed by the Eighth Circuit (*Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F. 2d 690, 693–694 (C.A. 8) (Iowa plan)) and the Second Circuit (*Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F. 2d 519, 523 (C.A. 2) (New York plan)), neither decision resting upon any new analysis, and the latter expressly rejecting the reasoning of the court of appeals in this case (*ibid.*).

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plan are permissible, apart from Section 110(f), if attainment or maintenance of national ambient air standards would not be affected.

Nor was the First Circuit's conclusion supported by its concern that to permit variances to be obtained other than as postponements under Section 110(f) would "invite protracted delay." 478 F. 2d at 886. While a source might well seek to litigate whether a variance in its favor would prevent attainment or maintenance of a national standard, the source would remain subject to the applicable requirements until a variance or revision were approved by both the state and EPA. Cf. *Getty Oil Co.* v. *Ruckelshaus*, 342 F. Supp. 1006, 1017–1019 (D. Del), remanded on other grounds, 467 F. 2d 349 (C.A. 3), certiorari denied, 409 U.S. 1125.

Most recently, EPA's position that Section 110(f) is not the exclusive procedure governing variances, at least in the pre-attainment period, has been sustained by the Ninth Circuit, which, like the First Circuit, held that a sensible construction of the Act required that EPA be authorized, without using the procedures and standards of Section 110(f), to approve "minor" variances, *i.e.*, those not affecting attainment or maintenance of national standards. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72–2145 (C.A. 9), decided November 11, 1974, slip op. pp. 5–13 (Arizona plan). Moreover, the court held that this authority was not limited to the pre-attainment period (see p. 34, *supra*, n. 23).[24] The court stated that if EPA lacked authority to approve such minor variances apart from Section 110(f), it would be "difficult to perceive any just basis for the Act's exhortation to the states to promulgate implementation plans even stricter than that required to attain national ambient air standards. See 42 U.S.C. § 1857d–1." Slip Op. p. 9.[25] Disagreeing with the decision of the court of appeals in the instant case, the Ninth Circuit could find no "congressional intent to establish section 110(f) as the exclusive mechanism by

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[24] Indeed, the court stated that its interpretation of the Act precludes EPA's rejection of a state plan on the ground that it permits "the issuance of 'minor' variances under a procedure other than that specified in section 110(f)." Slip Op. p. 13 (footnote omitted).

[25] NRDC has elsewhere acknowledged that under the Act "States are not only free but encouraged to set tighter standards and reach these standards at an earlier date than required by Federal law." Hearings on Implementation, *supra*, at 17.

which all changes of particular application may be accomplished." *Id.* at 12.

D. THE DECISION OF THE COURT OF APPEALS RESTS UPON AN ERRONEOUS ANALYSIS OF THE LANGUAGE AND PURPOSE OF THE CLEAN AIR ACT.

The court of appeals' conclusion that Section 110(f) is the exclusive procedure governing variances stems, first, from a serious misreading of the language of Section 110(f). Noting that Section 110(f) provides that a postponement may be granted with respect to the date that "any" source must comply with "any" requirement of a state plan, the court erroneously concluded that Section 110(f) is the exclusive procedure governing "*all* particular changes" in the applicability of the requirements of a plan (Pet. App. 21a–22a; emphasis in original). Howe r, especially in light of other provisions of the Act, this language in Section 110(f) is more persuasively read as merely authorizing postponements as to "any" requirement, but not mandating that all modifications of such requirements necessarily be treated as postponements subject to Section 110(f).

Second, in asserting that nothing in the Act supports the construction of Section 110(f) as not applying to a variance that does not threaten attainment of a national standard (Pet. App. 21a), the court gave no weight to the authority in the Act concerning revisions. The court erroneously disposed of the revision provision of Section 110(a)(3) with the *ipse dixit* that there was a "familiar and clear" distinction between a revision, which "is a change in a

generally applicable requirement," and a postponement or variance, which is "a change in the application of a requirement to a particular party" (*ibid.*). In adopting this distinction, for which it cited no authority, the court ignored the legislative history indicating that the use of the term "postponements" in Section 110(f) had reference primarily to deadlines for attaining national standards, and it gave no weight, let alone deference, to the interpretation of EPA, the agency responsible for implementing the Act.

The court's other premise was "that the plan of the statute was to secure ambitious commitments at the planning stage, and then, by making it difficult to depart from those commitments, to assure that departures would be made only in cases of real need" (Pet. App. 26a; see *id.* at 22a–23a). The court's conclusion, however, does not follow from that premise. As suggested above (see pp. 29–30, 33–34, 37, *supra*), one significant means of securing "ambitious commitments at the planning stage" was for states to make their plans more stringent than needed to attain national standards or generally effective at an earlier date than required for timely attainment of those standards, providing for exceptions in cases of real hardship. Since an excepted source could not rely on the continuation of such an exception past the attainment deadline, it would be no better off than if the state had deferred effective dates until the latest date, an approach that might well have tended to produce less

ambitious overall commitments at the pre-attainment planning stage.

Finally, the court of appeals took issue with the statement of the First Circuit in *NRDC–C.A. 1* that "provision for a three-year grace period, followed by the possibility of a further two-year extension [under Section 110(e)], indicates that Congress did not expect immediate achievement of standards." 478 F. 2d at 887. The court below stated (Pet. App. 26a):

> This statement, however, contains a crucial ambiguity, and it supports the First Circuit's holding only if that ambiguity is overlooked. It is of course true that the provision of a three-year grace period, and of the possibility, however limited, of an extension, do mean that Congress did not expect immediate achievement of *ambient* standards. But it does *not* follow that Congress did not contemplate that *emission* standards would not have to be met "immediately" as their scheduled dates—set by the implementation plan—arrived.

While it may not follow merely from these provisions that Congress did not contemplate that emission standards (or other aspects of a state's control strategy) would not have to be met as their scheduled dates arrived, it also does not follow that Congress intended such dates to be as inflexible as sole reliance on Section 110(f) as the means of change would leave them, in cases where compliance presented severe interim problems and an *ad hoc* relaxation of the standard would not interfere with the state's attainment or maintenance of national standards. To the contrary, while the Act as a whole gives the states no discretion concerning the national ambient standards to be promulgated by EPA, they were accorded substantial

latitude in determining the precise emission standards or other elements of the control strategy to be used in attaining and maintaining those standards, and the timing of their implementation.

In short, even if there is an ambiguity in the First Circuit's statement concerning "standards," it is not "crucial" because it is also clear that Congress did not expect immediate achievement of emission standards.

E. IN REJECTING EPA'S CONSTRUCTION OF SECTION 110, THE COURT OF APPEALS' HOLDING WOULD HAVE ADVERSE CONSEQUENCES NOT INTENDED BY CONGRESS.

The First Circuit's decision that Section 110(f) is the exclusive procedure for variances in the post-attainment period has been criticized as providing "a compelling argument against state adoption of regional emission limitations stricter than those required for attainment and maintenance of national [ambient air] standards." Comment, *Variance Procedures under the Clean Air Act: The Need for Flexibility*, 15 Wm. & M. L. Rev. 324, 337 (1973). That criticism is equally true of the court of appeals' decision in this case concerning the pre-attainment period. Moreover, the court's construction of Section 110, if it had been adopted by EPA at the outset, would also have tended to deter states from adopting deadlines for the requirements of their plans earlier than the mid-1975 attainment deadlines (see pp. 29–30, *supra*). Since states like Georgia, which chose to make various requirements effective early, may have obtained the necessary support for such stringent measures only because a limited variance procedure was available, it would seem unfair to those states, and to

the thousands of sources operating pursuant to variances approved by EPA as revisions of state plans pursuant to Section 110(a)(3), to hold that they have acted in vain because Section 110(f) governs exclusively.

As one commentator has said, "it is difficult to imagine a more cumbersome and time-consuming variance mechanism than that under section 110(f) * * *." Comment, *supra,* 15 Wm. & M. L. Rev. at 334. While such a difficult procedural hurdle may well be justified with respect to efforts to postpone requirements of a state plan that will interfere with timely attainment or maintenance of the mandatory standards, there is no reason to suppose that Congress would have intended such a mechanism to govern all minor variances, particularly in the pre-attainment period.

Substantial delays would have been inevitable if EPA had been required itself to hold formal public hearings[26] and satisfy Section 110(f) as to all variances, of which there have been 800 in Georgia alone. Although EPA has as yet processed only a few requests for postponements under Section 110(f), experience thus far indicates that the disposition of each such request will be time-consuming and will absorb substantial amounts of EPA's limited resources.[27]

[26] EPA's regulations provide that hearings pursuant to Section 110(f) shall comply with the procedural requirements of 5 U.S.C. 554 for adjudications. See 38 Fed. Reg. 22025–22030, 27286–27287; 40 C.F.R. 51.33.

[27] For example, a request submitted by the Governor of West Virginia on June 13, 1973 (38 Fed. Reg. 27319, 30136), is still pending. Having held formal public hearings on the request in January, February and October 1974, EPA is awaiting a recommendation by the administrative law judge. A request submitted by the Governor of Nevada on August 29, 1973 (38 Fed. Reg. 34020), was not approved until July 10, 1974.

If the court of appeals' decision were sustained, EPA arguably would be required to hold formal public hearings as to many, if not all, of the 800 Georgia variances already submitted to EPA, even if they have already been the subject of public hearings held by the state. A similar result might also follow as to the balance of the 3000 variances submitted to EPA by other states in the Fifth Circuit alone.[28]

For many sources, particularly in the pre-attainment period, it may not be reasonably possible to comply with some requirement of a state plan by its effective date, because, for example, more time is needed to devise or procure the necessary control mechanisms. Yet, because of the one-year limitation and the substantive standards of Section 110(f), wholesale application of that provision to all requests for variances would have the result that many sources would be in violation and might face burdensome litigation, with the risk of being shut down, even though the variance sought would not interfere with attainment or maintenance of national standards. "Such a result appears unduly harsh, particularly in the absence of an explicit manifestation of congressional

[28] We do not think it necessary to resolve here the consequences of affirmance of the decision below for other plans not challenged in the Fifth Circuit (or elsewhere), or for the plans involved in the cases sustaining EPA's power to approve variances apart from Section 110(f). Those questions present potentially difficult legal and practical problems not before the Court in this case and not considered by the court below.

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intent on the question." Comment, *supra,* 15 Wm. & M. L. Rev. at 336. See, also Luneburg, *Federal-State Interaction under the Clean Air Amendments of 1970,* 14 B.C. Ind. & Comm. L. Rev. 637, 651, 653 (1973).

Because it would thus undesirably restrict the flexibility of the states and EPA in assuring the adoption and enforcement of control strategies for attaining and maintaining the national ambient air standards, the holding below should not be sustained. We submit that EPA's interpretation of the Clean Air Act as not requiring that all variances from requirements from state plans be subjected to the requirements of Section 110(f), and as permitting variances to be treated as revisions under Section 110(a) (3) if they will not interfere with timely attainment or maintenance of national standards, is not only consistent with the language, history and intent of the Act, but represents sound policy in the effort to achieve all of the Act's purposes. Accordingly, the decisions of the First, Second, Eighth and Ninth Circuits should be upheld, insofar as those courts have construed the Act as giving EPA authority to approve variances without resorting to Section 110(f), although we believe that EPA reached that conclusion through a preferable route.[29]

[29] Although these courts have stated that variances not subject to Section 110(f) must be approved by EPA, there is no explicit statutory basis for that requirement other than the revision authority of Section 110(a)(3), on which the courts did not rely. Moreover, under Section 110(a)(3), the states are obliged to provide an opportunity for a public hearing and EPA's approval is subject to judicial review (see p. 21, *supra*).

The holding below, moreover, would result in unwarranted constriction of state autonomy to determine how the national standards should be attained and implemented within each state. In providing for national air quality standards, Congress plainly meant to establish national ends to be achieved. But it did not intend comparably to nationalize decision-making about the means for achieving those ends—decisions whose economic, social and political dimensions are of particular concern to the states and localities most immediately affected by them.

Finally, there is no evidence—and the court below did not suggest—that EPA's treatment of variances has resulted in abuses. As noted, the state itself must first have provided an opportunity for a public hearing—as the Georgia law in issue here requires (see pp. 3–4, *supra,* n. 2).[30] Then, EPA publishes notice of requests for variances and invites comments. Nor does EPA grant rubber-stamp approval of such requests: there have been significant published denials.[31] And, although EPA has now approved thousands of variances pursuant to Section 110(a)(3), not one such approval has been successfully challenged in court.[32]

[30] Indeed, in some states requests for revisions are submitted by the governor, as requests for postponements must be. See *e.g.*, 39 Fed. Reg. 16348.

[31] See, *e.g.*, 37 Fed. Reg. 23837; 39 Fed. Reg. 16348, 30834.

[32] The reasonableness of the use being made of variances by the states and EPA is indicated by the fact that a great many variances have been for periods shorter than the entire period prior to the attainment deadline and many have already expired. *E.g.*, 39 Fed. Reg. 16348–16349, 35335–35343.

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CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT

This case involves the interpretation of § 110(f) of the Clean Air Amendments of 1970, 42 U.S.C. § 1857c-5 (f), which addresses the treatment of air pollution sources that fail to meet previously agreed-to timetables for compliance with the requirements of State Implementation Plans adopted under the Act. Respondents contend that

§ 110(f) should be read as written, so that all requests by individual sources for additional compliance time should be tested by the standards of the federal law. The government, though it published regulations largely in agreement with this view on September 26, 1974, now urges that such requests should be tested by the far more lax standards and procedures of State variance laws, unless, in the judgment of the Environmental Protection Agency ("EPA"), such a request would cause a violation of a National Ambient Air Quality Standard. This condition appears nowhere in the Act, and is utterly inconsistent with its history, structure, and policies. If adopted, it would undermine the most crucial and innovative aspects of the Act, sap its effectiveness, permit continued increases in emissions, and thus assure additional deaths, disease and economic injury among millions of American citizens.

A. The Consequences of Failing to Meet the Act's Requirements.

The Clean Air Amendments are strong legislation, commensurate with Congress' sharp perception of the gravity of the threat to public health and the environment posed by the rapidly increasing emissions of pollutants. For example, emissions of sulfur oxides, one of the most common and deadly pollutants, from steam electric power generating facilities increased seven-fold in the period 1940-1970, from 3 million tons to 20 million tons per year nationally, and in recent years have been rising by over 1 million tons each year.[1] If the accelerating growth in emissions of this pollutant from power plants continues as it has, the Environmental Protection Agency projects that sulfur oxide emissions

[1] U.S. Environmental Protection Agency, *Nationwide Air Pollutant Emission Trends, 1940-1970*, AP-115 5, Table 3 (1973).

will reach 41 million tons per year by 1980, *thirteen times* their 1940 levels.[2]

The full cost to society of these emissions is, obviously, difficult to establish exactly, but the estimates of the monetary toll alone show it to be substantial. In 1973, the President's Council on Environmental Quality ("CEQ") estimated the quantifiable costs of air pollution in 1968 at some $16 billion annually,[3] a figure which is generally conceded to be roughly accurate.[4] Such figures cannot, of course, fully express the suffering by those afflicted with pollution-induced lung and heart diseases. A recent analysis, done jointly by Cornell University economists, utility industry representatives, and EPA staff for the Federal Power Commission estimated that unless power plant emissions are greatly curtailed, the continued growth in generating capacity will assure violation of the Clean Air Act's standards. The analysis concluded that the failure to meet the National Air Quality Standards would have the gravest consequences for public health:

> The adverse health effects of not meeting clean air standards will be considerable. The number of premature deaths may reach over 6,000 per year by

[2] U.S. Environmental Protection Agency, National Environmental Research Center, *Summary Report on Suspended Sulfates and Sulfuric Acid Aerosols*, Research Triangle Park, North Carolina (1973), 39, quoting "Abatement of Sulfur Oxide Emissions from Stationary Sources," National Academy of Engineering, COPAC-2.

[3] U.S. Council on Environmental Quality, *Environmental Quality: The Fourth Annual Report of the Council on Environment Quality* 77-78 (1973).

[4] Report by the Coordinating Committee on Air Quality Studies, National Academy of Sciences, prepared for the Committee on Public Works, U.S. Senate, *Air Quality and Automobile Emission Control*, Volume I, 121 (1974).

1980 and the total excess between 1975 and 1980 could exceed 25,000.[5]

It is this sort of information which led the Senate Public Works Committee, primary authors of the 1970 Amendments, to summarize the reasons for their proposed Amendments as follows:

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[5] The *Report* went on to describe the other effects that could be expected if the National Standards were not met:

> Each year an average elderly person will experience an unnecessary 5 to 10 days when his chronic heart and lung disorders will be perceptibly aggravated. If standards are not met, the excess number of aggravation days for our senior citizens would be 20 to 30 million days each year and total over 160 million days during the years 1975 to 1980. Each year a typical asthmatic might expect one to two unnecessary asthma attacks. If standards are not met, the excess number of asthma attacks would be 6 to 10 million each year and could total over 50 million during the years 1975 through 1980. Each year otherwise healthy children would experience 400 to 900 thousand more common but severe acute respiratory disorders like croup, acute bronchitis and pneumonia. Between 1975 and 1980 children would be burdened with more than 4,500,000 excess acute respiratory illnesses if standards are not met. If standards are not met, adults would be burdened more frequently with persistent chronic respiratory disease symptoms. In 1975 an excess of more than 900,000 adults would be involved and by 1980 an excess of over 1,500,000 adults might be expected to report persistent chronic respiratory disease symptoms.

It concluded:

> In summary, present rough estimates conclude that substantial excess adverse health effects can be expected each year if standards are not met: thousands of premature deaths, millions of days of illness among susceptible segments of the population, hundreds of thousands of needless acute lower respiratory illnesses in otherwise healthy children and hundreds of thousands of chronic respiratory disorders among adults.

Chapman, et al., *Power Generation: Conservation, Health, and Fuel Supply. A Report to the Task Force on Conservation and Fuel Supply, Technical Advisory Committee on Conservation of Energy.* National Power Survey, U.S. Federal Power Commission 17-18 (1973).

> The Committee's concern with direct adverse effects upon public health has increased since the publication of air quality criteria documents for five major pollutants . . . . These documents indicate that the air pollution problem is more severe, more pervasive, and growing at a more rapid rate than was generally believed.

S. Rep. No. 91-1196, 91st Cong., 2d. Sess. 1 (1970).

At the same time, those who have studied the problem generally agree that the cost of controlling air pollution is less than the cost it imposes on the nation. The CEQ estimates that unless pollution is controlled, the damages from all sources of air pollution will amount to some $24.9 billion annually by 1977.[6] Yet EPA estimates that the cost of abating air pollution will not exceed $14 billion annually for the next five years.[7]

B. History of the Clean Air Amendments of 1970.

The 1970 Amendments represent a major break with prior federal air pollution control efforts, occasioned by the accelerating threat to human health and welfare and Congressional dissatisfaction with previous efforts to control this threat. For 15 years, through four separate pieces of legislation, Congress sought to solve this public health problem by granting federal and state administrators wide discretion. By 1970 it was clear that these attempts had failed. The air pollution problem was worsening at an increasing rate. Thus the 1970 Amendments reflect deep Congressional impatience with the long history of inaction by both State and federal bureaucra-

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[6] U.S. Council on Environmental Quality, *Environmental Quality: The Fourth Annual Report of the Council on Environmental Quality* 78 (1973).

[7] U.S. Environmental Protection Agency, *The Cost of Clean Air: Annual Report of the Administrator of the Environmental Protection Agency to the Congress of the United States* I-4 (1974).

cies, and are intended to restrict substantially the range of administrative discretion and State authority.

Prior to 1970, the federal air pollution legislation was a near textbook model of federalism. The first major federal act dealing with the problem was the Act of July 14, 1955, 69 Stat. 322 ("1955 Act"). This Act was an invitation to the States to act: it set out the problem and promised federal support, but specifically gave responsibility for standard-setting and enforcement to the States.

After eight years of State inaction, Congress passed the Clean Air Act of 1963. 77 Stat. 392 (1963) ("1963 Act"). The legislature recognized that since 1955 there had been accelerating growth in the air pollution problem. 1963 Act § 1(a), 77 Stat. 392, 42 U.S.C. § 1857 (a). In light of the deteriorating situation, Congress gave the federal government its first, greatly limited, enforcement power, a complex and unwieldly "conference" procedure for interstate pollution problems, which could, with sufficient perseverance, lead to court action. 77 Stat. 396, presently 42 U.S.C. § 1857(d), as amended. Two years later, Congress increased slightly the power of the federal government to take action to abate pollution, giving the federal authorities the authority to begin the conference and hearing process without receiving a formal request from the States. Amendments to the Clean Air Act, 79 Stat. 996 (1965).

By 1966 only 26 States had established legislative controls over air pollution. Many of those States' statutes were riddled with variance provisions that undermined effective action to clean the air. U.S. Depart. of Health, Education, and Welfare, "A Digest of State Air Pollution Laws," Public Health Service Pub. 711, at ii (1966).

As a result of continuing State failure to act, Congress once again increased the federal responsibility for controlling air pollution by passing the Air Quality Act of

1967, 81 Stat. 485 (1967) ("1967 Act"). Federal authorities were to designate "Air Quality Control Regions" and to publish air quality "criteria"—compilations of the results of scientific studies of the effects of various pollutants on human health and welfare. 81 Stat. 490.

The 1967 Act still provided State and federal administrators wide discretion. For example, the federal government was given eighteen months merely to designate the boundaries of Air Quality Control Regions ("AQCR's") and asked to compile the air quality "criteria" documents only as soon as practicable. 81 Stat. 490. But the National Air Pollution Control Administration ("NAPCA") failed to carry out even these first minimal steps towards air pollution control with the anticipated dispatch. By the end of 1969 criteria documents had appeared for only two of the six most prevalent pollutants.[8] After nearly three years, NAPCA reported to Congress in 1970 that it had managed to designate only twenty-five Air Quality Control Regions.[9] Only 12 enforcement actions were ever undertaken during the three years of the Act's life.[10]

As the continued failure of federal and State administrators to act became manifest, the United States Congress addressed itself again, for the fifth time in

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[8] The criteria document for sulfur oxides first appeared in 1968, and was reissued in 1970, U.S. Dept. of Health, Education, and Welfare, Public Health Service AP-50; the one for particulate matter was issued in January of 1969, as AP-49. During the hearings on the 1970 Amendments, Senator Randolph remarked acidly on the fact that publication of three additional criteria documents occurred only when Congress convened hearings. Hearings on S. 3229, S. 3466, 3546 before the U.S. Sen. Comm. on Public Works, Subcomm. on Air and Water Pollution, 91st Cong., 2d Sess. 126 (1970) [Hereinafter, "Sen. Clean Air Amendments Hearings"].

[9] *Id.* By contrast, under the 1970 Act AQCR's were to be designated within 90 days, § 107(c), 42 U.S.C. § 1857c-2(c). As a result the total number of AQCR's rose in three months to 247.

[10] BNA Environment Reporter, Federal Laws 41:1201-05.

15 years, to the goal of protecting public health and welfare from the effects of air pollution. The Clean Air Act Amendments of 1970, 42 U.S.C. 1857 *et seq.*

Rejecting Administration [11] and House [12] bills that would have largely perpetuated the tradition of granting wide discretion to State and federal administrators, the Congress chose in 1970 to limit the discretion that had undermined previous efforts to abate pollution. Unlike previous legislation, the 1970 Amendments are studded with explicit deadlines for action [13] and specifically articulated standards for decisions.[14] If the States fail to act as required, EPA must step in with federal regulations.[15] If inaction continues, EPA is directed to take over State pollution control programs and to use its greatly increased enforcement powers.[16] In case either EPA or a State government fails to discharge its duties,

[11] S. 3466, printed in Sen. Clean Air Amendments Hearings, *supra* 26 *et seq.*

[12] H.R. 17255. H Rep. No. 91-1146, 91st Cong., 2d Sess. ~~26~~ 25 *et seq.* (1970).

[13] *See, e.g.*, § 108(a)(1) and (2), 42 U.S.C. § 1857c-3(a)(1) and (2); § 109(a)(1) and (2), 42 U.S.C. § 1857c-4(a)(1) and (2); § 110(a)(1), (a)(2), (c)(1)(C), 42 U.S.C. § 1857c-5(a)(1), (a)(2), (c)(1)(C), § 111(b)(1)(A) and (B), § 1857c-6(b)(1)(A) and (B); §112(b)(1)(A) and (B), 42 U.S.C. § 1857c-7(b)(1)(A) and (B); § 113(a)(2), 42 U.S.C. § 1857c-8(a)(2); § 202(b)(1), (2) and (4), 42 U.S.C. § 1857f-1 (b)(1), (2) and (4); § 212 (d)(3)(F), 42 U.S.C. § 1857f-6e(d)(3)(F); § 231(a)(1) and (2), 42 U.S.C. § 1857f-9(a)(1) and (2); § 313, 42 U.S.C. § 1857j-2.

[14] *See, e.g.*, § 108(a), 42 U.S.C. § 1857c-3(a); § 109(b), 42 U.S.C. § 1857c-4(b); § 110(a)(2), (a)(3), (c), (e) and (f); 42 U.S.C. § 1857c-5(a)(2), (a)(3), (c), (e) and (f); § 111(a)(1), 42 U.S.C. § 1857c-6(a)(1); § 112(a)(1), 42 U.S.C. § 1857c-7(a)(1); § 113(a)(1), (2) and (3), 42 U.S.C. § 1857c-8(a)(1), (2) and (3); § 202(a) and (b), 42 U.S.C. § 1857f-1(a) and (b); § 207(c), 42 U.S.C. § 1857f-5a(c); § 211 (c), 42 U.S.C. § 1857f-6c(c); § 212(a)(4), 42 U.S.C. § 1857f-6e(a)(4); and § 231(a), 42 U.S.C. § 1857f-9(a).

[15] § 110(c), 42 U.S.C. § 1857c-5(c).

[16] § 113, 42 U.S.C. § 1857c-8.

the Act gives citizens the right to sue for injunctive relief in federal court.[17]

C. The Regulatory Scheme.

In drafting the Clean Air Amendments, Congress drew upon its 15 years of experience to fashion a regulatory scheme designed to prevent the administrative backsliding that had gone before, and tailored to the special regulatory problems posed by the physical nature of the air pollution problem.

The vehicle for the attainment of air quality protecting public health and welfare is the State Implementation Plan. § 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The purpose of this document is to describe the measures needed to curtail air pollution, and to force the State to bind itself to take these measures.

The statute requires the Environmental Protection Agency to promulgate regulations establishing National Primary and Secondary Ambient Air Quality Standards, indicating concentrations of pollutants in the general outdoor ("ambient") air just below those that have been demonstrated to have adverse effects on people (Primary Standards) and the remainder of the environment (Secondary Standards). § 109, 42 U.S.C. § 1857c-4. These levels are assumed, for purposes of the law, to constitute threshold concentrations below which damage does not occur.[18]

[17] § 304, 42 U.S.C. § 1857h-5.

[18] The assumption that such thresholds exist must be seen as a matter of regulatory convenience, rather than scientific fact. Congress was informed, even as it considered the Clean Air Amendments, that the scientific community doubted the assumption, believing it more likely that air pollutants caused injury to public health at any concentration in the ambient air. Dr. Middleton, then head of the National Air Pollution Control Administration (EPA's predecessor with respect to air pollution control), for example, told the Senate Subcommittee members that in his opinion

One of the crucial innovations of the Amendments is the requirement that the States commit themselves, in their State Implementation Plans, to a stated deadline for the attainment of each type of Standard. In the case of Primary Standards, protecting public health, the State must attain the Standard "as expeditiously as practicable," but in any case no more than three years from the federal approval of its Plan.[19] In the case of

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the thresholds then under consideration were probably artifacts of our present scientific knowledge:

> We know from the criteria published for sulfur oxides, that at certain levels definite adverse effects occur in the lung. We also know that at a little lower level there are more subtle effects on the action of the lung, and that below that some enzyme system begins to fail or to function improperly.
> The no-effect level would have to be somewhere below that, but as science progresses, it is very likely that we are going to find still other body chemical systems that are being affected, *so the no-effect level always corresponds, you might say, to the limitations of scientific knowledge in this area.* [emphasis supplied.]

Sen. Clean Air Amendments Hearings, *supra*, 1490.

This is one reason why some States considered it prudent to seek to attain air cleaner than the National Standards, and why both Congress and EPA encouraged this quest. § 116, 42 U.S.C. § 1857d-1, and 40 C.F.R. § 51.13(d).

[19] The history of this requirement indicates that it was increasingly tightened as the bill progressed through the Congress. The Administration's original bill would have required the attainment of Standards only within "a reasonable time." S. 3466, § 7(a), printed at Sen. Clean Air Amendments Hearings, *supra*, 37. The original bill proposed in the Senate Subcommittee on Air and Water Pollution contained identical language, as did the House bill. S. 3546, § 4, which would have amended § 108(c) of the 1967 Air Quality Act, printed at *Id.*, 49; H.R. 17255, § 108(c)(1)(C)(i), printed at H.R. Rep. No. 91-1146 26 (1970).

The bill finally passed by the Senate was stricter, but still less stringent than the Act itself. It would have required the attainment of the Standards "within three years" of the date of the approval of the State Plan. S. 4358, § 111(a)(2)(A), printed in S. Rep. No. 91-1196, 91st Cong., 2d Sess. 68, 87 (1970).

25, 29

[Footnote continued on page 11]

Secondary Standards, the State must specify in its Plan a "reasonable time" for attainment. § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Experience with previous federal legislation demonstrated forcefully, however, that *ambient air quality* standards were not sufficient alone to regulate sources of pollution.[20] Because the air is continuously moving, mixing pollutants emitted from sources over very large areas,[21] it is impossible except under very rare circumstances to relate the air quality at any given spot to the emissions from any given polluter with sufficient certainty to satisfy the court-room standards of proof. For this reason, the Clean Air Amendments also require each State to adopt enforceable *emission limitations*, for each general category of source, specifying quantities of pollutants that may be released at the smokestack.[22] These

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[19] [Continued]

The Conference Committee further tightened these deadlines, and the Amendments as passed require each State to choose a deadline for attainment that is "as expeditious as practicable but (subject to subsection (e)) in no case later than three years from the date of approval." § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

[20] This point was made virtually from the time of passage of the Air Quality Act of 1967, which required the States to adopt only ambient air quality standards. *See, e.g.*, John E. O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW AND CONTEMPORARY PROBLEMS 275 (1968). For a recent discussion of this point, *see* Richard E. Ayres, *Enforcement of Air Pollution Controls on Stationary Sources Under the Clean Air Amendments of 1970*, (forthcoming) 4 ENVIRONMENTAL LAW QUARTERLY—(Fall, 1974).

[21] Rall, David P., *A Review of the Health Effects of Sulfur Oxides*, National Institute of Environmental Health Services, N.I.H., Research Triangle Park, North Carolina 22 (1973). Also, U.S. Environmental Protection Agency, National Environmental Research Center, *Summary Report on Suspended Sulfates and Sulfuric Acid Aerosols*, Research Triangle Park North Carolina p. a-b, (1973).

[22] The Report of the Senate Committee made this point very clearly:

> Because attainment of ambient air quality is possible only through the enforcement of precise and objective emission

emission limitations are the tools for attaining the goal of healthful air quality.[23] To determine what emission limitations would be necessary, the States first calculated the degree to which the National Ambient Air Quality Standards were being exceeded in each of the natural airsheds within their territory.[24] On the basis of these calculations, each State then adopted uniform emission limitations for various relatively homogeneous classes of polluting sources throughout each airshed, or throughout

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controls the Committee bill would delete the enforcement requirement for the abatement of violations of the air quality standard. The precise and objective emission controls "subject to enforcement" would include but not be limited to emission requirements, emission standards, standards of performance, prohibitions of emissions, schedules and timetables of compliance and other requirements for recordkeeping and the installation of monitoring equipment.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 21 (1970). *See also, Id.*, 12, and testimony of Terry L. Stumph and Robert L. Duprey, of the National Air Pollution Control Administration, before the Senate Subcomm. on Air and Water Pollution, Sen. Clean Air Amendments Hearings, *supra*, 397 (1970).

The Congressional intent to use emission limitations as the regulatory basis of the 1970 Amendments was also discussed at length in the 1972 Senate Oversight Hearings on the Act. *See* Hearings, "Implementation of the Clean Air Amendments of 1970," before the Senate Comm. on Public Works, Subcomm. on Air and Water Pollution, 92nd Cong., 2d Sess. 180, 207-209, 244, 268-271 (1972).

[23] Emission limitations may take various forms, depending on the kind of industry being regulated and the most efficacious methods for reducing its effluent. Some emission limitations prescribe the quantity or weight of pollutants per pound of material processed that may be emitted from a factory's smokestack, leaving entirely up to the industry the technique to be used to comply with the limitation. Some specify the allowable pollutant concentration in the fuel used. Others, in industries such as steel manufacturing, specify that a particular process or procedure be used in order to reduce emissions.

[24] The 1967 Air Quality Act first required the States to designate the natural airsheds within their boundaries for the purposes of air pollution control. These areas are known as Air Quality Control Regions ("AQCR"). § 107, 42 U.S.C. § 1857c-2.

the State as a whole. These easily enforceable emission limitations, rather than the ambient air quality standards, establish the actual degree of control that each source of pollution must undertake.

Some regulated sources were, of course, already closer to meeting the emission limitations that applied to them than others at the time the State Implementation Plans were adopted. In order to provide the flexibility needed to take account of these differing circumstances, the Act required States to negotiate individual compliance schedules for meeting the general emission limitations for each pollution source. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). Compliance schedules extending over more than 12 months included enforceable "increments of progress," in order to assure that the source does not fall behind in taking the required control actions. 40 C.F.R. § 51.15(c), App. 9.

If an individual source fails to meet the negotiated timetable, the regulatory agency must decide whether to authorize additional time for compliance or subject the source to jeopardy of enforcement action. This case presents the question of which level of government Congress intended to make this decision, and what criteria are to be used to decide whether a source shall be given additional time, even after it has failed to meet a previously agreed-upon compliance schedule. Under the State laws that governed prior to the Clean Air Amendments, a source owner could seek a delay by applying for a "variance" from the State pollution control agency. If (usually after a public heading) the State agency determined that the polluter had met vaguely specified standards of hardship,[25] it could grant a variance pre-

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[25] The Georgia statute that was the object of the court's decision below, GA. CODE ANN. § 88-912, is a catalogue of the kinds of hardship considerations in most State statutes. It is reprinted at the end on this brief, *infra* at 51.

venting the State (or any other party) from suing for enforcement of the original timetable.

At issue in this case is one of the key provisions of the Act, which embodies Congress' decision to limit the discretion of federal and State administrators to grant such sources additional time for compliance. § 110(f), 42 U.S.C. § 1857c-5(f). As noted previously one of the major weaknesses in the State air pollution control programs that had grown up under the earlier clean air statutes was the broad discretion given State administrators to grant variances to escape clean-up deadlines. The Georgia vairance statute, with its broad and vague standards, poorly articulated procedures, and low visibility administrative discretion, is an archetype of these laws. It was obvious that the deadlines and other carefully drawn requirements of the 1970 Amendments would be threatened if administrators were allowed to continue exercising this vast discretion. Congress thus explicitly pre-empted such State variance laws with the federal postponement procedure of § 110(f), which sets up a highly visible procedure for reaching a decision and specifies clear standards for deciding whether more time is warranted. This procedure is the linch-pin of the entire federal scheme. For the protection of public health and welfare, and the vindication of Congressional intent, it must be upheld as written.

Under § 110(f), an individual polluter must demonstrate, in a federal administrative adjudicatory proceeding, that he meets four specific requirements in order to obtain a one year "postponement" of his timetable for compliance:

> (A) that he has made good faith efforts to comply with the Plan's requirement;
>
> (B) that the necessary technology or other methods of control are not available or have not been available for a sufficient period of time to enable compliance;
>
> (C) that he has implemented the available alternative operating procedures or other interim control measures to minimize the impact of continued noncompliance on public health;
>
> (D) that continued operation of the sources is essential to national security or public health and welfare.

§ 110(f)(1)(A)-(D), 42 U.S.C. § 1857c-5(f)(1)(A)-(D).

Keeping in mind that Congress did not intend to sanction granting individual polluters additional compliance time willy-nilly, the requirements for obtaining a postponement are neither burdensome nor unreasonable. A polluter who asks for additional time for compliance is asking the government to sanction emissions that will damage the health and welfare of its people—emissions which he had earlier agreed to abate. In such a situation, it does not seem unreasonable to require the polluter to show that his inability to comply on time is the result of real impossibility, despite good faith efforts; that he is applying all the alternative interim measures he can to reduce the damage to health until he can comply; and that the operation of his source of pollution has a social value that justifies the additional social harm he seeks to inflict. When one considers the Congressional purpose in enacting the Clean Air Amendments, it seems hardly untoward to burden those who would endanger public health with the duty to justify their request.

All parties before the Court agree that this federal procedure pre-empts State variance laws. The disagreement has to do with what circumstances trigger pre-emption. Respondents, in concert with the court below and three of the other four Courts of Appeal that have considered the issue, maintain that pre-emption is trig-

gered as of a date certain. The Fifth Circuit, tracking the clear and unequivocal language of the statute, held that once the EPA Administrator approved a State's Implementation Plan, the State's variance law was pre-empted. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 489 F.2d 390, 398-403 (5th Cir. 1974). The First Circuit agreed, but, seeking to allow EPA and the States somewhat more flexibility, stretched the statute's language to hold that pre-emption occurred only as of the date chosen by the State for attainment of the National Primary Ambient Air Quality Standards. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 478 F.2d 875, 884-888 (1st Cir. 1973). Two other Courts of Appeals, those for the Eighth and Second Circuits, followed the First Circuit. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 483 F.2d 690, 693-694 (8th Cir. 1973), and *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 494 F.2d 519, 523 (2d Cir. 1974). The practical effect of these four decisions becomes increasingly similar as the States' attainment dates approach.[26]

EPA acceded to this interpretation in regulations published September 26, 1974 (after the filing of its petition for certiorari with this Court), which disapproved the variance statutes of all the States. 39 Fed. Reg. 34533-37, 34572-74 (Sept. 26, 1974), App. 11-27. In its brief here, however, the Agency has taken a radically different position, claiming that pre-emption is triggered only upon its own finding that a State variance will result in air quality worse than a National Air Quality

[26] Thirty-two of the States chose July, 1975, or earlier, as the date for attaining the National Standards for the pollutants most associated with the stationary sources that could be expected to request variances or postponements. The remaining 18 received extensions of the attainment date under § 110(e), 42 U.S.C. § 1857c-5(e), up to two years.

Standard. This represents a return to its earlier position, which was rejected explicitly by four of the five Courts of Appeal.

This approach was also considered, and rejected, by Congress, when it wrote the Clean Air Amendments, as part of the general Congressional decision to avoid the use of ambient air quality standards to regulate individual pollution sources which has been discussed previously. It would have the effect of undermining the uniform national regulatory system that Congress sought in passing the Amendments, thus setting back seriously the nation's effort to restore the air to breathable quality. And it is flatly inconsistent with the plain words of the statute itself. For these reasons, this Court should reject EPA's newest attempt to return to its discredited earlier interpretation, and order the Agency to adhere to the scheme adopted by Congress.

SUMMARY OF ARGUMENT

The question in this case is the proper interpretation of § 110(f), the federal postponement procedure of the Clean Air Amendments of 1970. Section 110(f) provides a federal procedure for determining whether an individual source of pollution may be granted additional time to meet previously agreed-upon compliance schedules for curtailing its emissions into the air. Respondents, in concert with the court below, take the position that once the initial regulatory actions were taken under the Amendments, the federal procedure pre-empted lax State variance laws. EPA, on the other hand, urges that the federal procedure pre-empts only after its own decision that the requested variance would prevent the attainment or maintenance of a National Ambiant Air Quality Standard—a decision which it has admitted, in other contexts, is subject to as much as 100 per cent error.

Section 110(f) is not ambiguous, and it provides no room for the interpretation EPA is attempting to give it. The section provides that a federal proceeding before EPA shall be convened whenever "*any* stationary source" seeks additional time "to comply with *any* requirement of an applicable implementation plan" [emphasis supplied]. Congress chose this language from among several alternatives that would have allowed the States to continue granting variances. The legislature chose to adopt a uniform federal system, with clear procedures and standards for decision, in order to prevent the administrative backsliding and playing off of one State against another that had hobbled earlier clean air legislation.

The statute provides that an approved Implementation Plan may be altered through a "revision," § 110(a)(2)(H), (a)(3), 42 U.S.C. § 1857c-5(a)(2)(H), (a)(3), and EPA has sought to justify its approval of State variance laws under its revision authority. This simply cannot be squared with the statute. A revision (the word is used six times consistently in § 110) is a device initiated by EPA for making general changes in an entire Implementation Plan if, for example, EPA promulgates a new National Ambient Air Quality Standard. A postponement, on the other hand, is a procedure invoked by the source-owner (through his Governor) to alter a specific portion of a State Plan as it applies to that source.

Five Courts of Appeal have reviewed the question presented here. All five held that EPA may not claim power from the revision authority of the statute to allow States to grant variances. Four, including the Court below, agreed with respondents that the federal postponement provision pre-empts State variance laws as of a time certain, rejecting EPA's argument that pre-emption is triggered by a judgment about air quality. The court below held that pre-emption occurred when State Plans were approved, while the First Circuit, followed by the Second and Eighth, held that pre-emption occurred only in the "post-attainment" period—the period after the date chosen by the State for attainment of the National Primary Standards. For practical purposes, these four decisions are becoming increasingly indistinguishable, since in most States the attainment date, at least for Primary Standards, is mid-1975.

EPA's own regulations even belie its present position. EPA has repeatedly stated that it does not believe ambient air quality measurements or estimates are appropriate to make regulatory decisions for individual sources. Recently, the Agency applied this to variances, promulgating regulations that explicitly pre-empt all state variance statutes in the post-attainment period. These regulations abandon any attempt to use air quality to determine when State variance laws are pre-empted, or to claim authority for this attempt from the revision authority of the Act.

These regulations purport to adopt the First Circuit's holding. Much as they undermine EPA's position, they do not meet the requirements of the Act. The legislative history of the Act shows that Congress considered pre-empting State variance laws only in the "post-attainment" period, but decided, as part of a general tightening of key parts of the bill, that the postponement provision should apply whenever "any source" seeks more time to comply with "any requirement" of a State Plan.

Interpreting the postponement provision as it is written is crucial to the attainment of the Congressional purpose. If EPA may determine when § 110(f) applies by ad-hoc air quality judgments (which it admits may be quite inaccurate), then the whole structure of the Act collapses. Unable to determine with precision when a source is violating air quality standards, the States and EPA will be easy prey to political pressure and hardship arguments on a case-by-case basis. In the end, emissions will

continue to rise, the National Standards will not be attained, and we can expect the serious health consequences outlined previously, *supra* 2-5.

The postponement provision will not be more burdensome to administer than EPA's proposal. Far from simplifying matters, EPA's variance/revision scheme would involve two agencies rather than one and inject several new issues into the decision whether to grant more time—some, such as air quality, extremely difficult and costly to determine. The revision process is anything but expeditious. In the past, EPA has often taken a year or more to approve a revision. On the other hand, if the postponement provision operates as Congress expected, it will deter some sources from seeking additional time, reducing the Agency's burden while encouraging compliance.

Nor is it necessary to sanction EPA's misreading of the statute because of State reliance on EPA's interpretation. EPA has suggested that it allowed variances to entice the States into choosing early dates for the expiration of compliance schedules and attainment of Standards. If this is true, there was no need for it. The States were required to choose the earliest date practicable for attaining the Standards, and EPA had a duty to disapprove any Plans that did not. As a matter of fact, early dates were not chosen. Only three of the States where the Primary Standards were violated chose attainment dates earlier than the statutory maximum time period. And many individual compliance schedules are still being negotiated, nearly three years after they were to have been submitted under the statute. Thus reliance, though a theoretical possibility, has not in fact occurred.

The supposed reliance problem EPA cites arises from the fact that EPA did not correct the failure in some State laws to distinguish between compliance schedules, negotiated when the Plan was being adopted, and later

requests for additional time. This could have been done at the time the State Plans were submitted, and under EPA's own regulations, should have been. Instead, the Agency chose to ignore its own clarifying regulation in the hope that it could use the ensuing confusion as a lever to coerce the courts into its view of the postponement procedure. This attempt should be rejected, and appropriate action ordered.

ARGUMENT

I. THE CLEAN AIR AMENDMENTS PRE-EMPT THE STATES FROM ISSUING VARIANCES TO THE TIMETABLES OF COMPLIANCE, EMISSION LIMITATIONS, AND OTHER REQUIREMENTS OF STATE IMPLEMENTATION PLANS.

A. This Conclusion Is Compelled By The Language And Structure Of The Act, And Its Legislative History.

This case presents a straight-forward question of statutory interpretation: whether § 110(f) of the Clean Air Amendments is the exclusive mechanism for a polluting source to request more time to comply with the timetables of compliance for meeting the emission limitations and other requirements of its State Implementation Plan. As always, the words of the statute itself provide the first and authoritative indication of the intent of the legislature. In this case, these words are surpassingly clear:

> Prior to the date on which *any stationary source (or class of moving sources)* is required to comply with *any requirement of an applicable implementation plan* the Governor of the State to which the plan applies may apply to the Administrator to postpone the applicability of such requirement to such

source (or class) for not more than one year. [emphasis supplied]

42 U.S.C. § 1857c-5(f)(1).

These words are stark and unequivocal—a request for additional time from *any* individual pollution source to comply with *any* requirement must be made through the postponement procedure. There is not the slightest suggestion in these words that the application of this procedure is limited either in time or circumstance. Once a State Plan becomes "applicable"—that is, once it has been approved by the Administrator[27]—an individual pollution source may not obtain an alteration in its timetable for compliance save through a postponement proceeding.[28]

Congress chose this language from among several alternatives. The Administration favored continued State control over deadlines,[29] which would have perpetuated the lax State variance statutes. So did the original House bill.[30] But Congress rejected these proposals resound-

[27] *See* § 110(a) and (c), 42 U.S.C., § 1857c-5(a) and (c).

[28] Of course, the source may actually take more time to comply, even if it does not seek or fails to obtain a postponement, but only at the risk of enforcement action. As a practical matter, sources that are exerting good faith efforts may have little to fear from enforcement actions, even if they do not qualify for a postponement, since the federal and State agencies may have far fewer resources than they need to enforce fully the Act's requirements, and therefore may choose to act against willful violations first.

But the possibility that enforcement action could be taken will tend to encourage source-owners to achieve compliance as rapidly as possible.

[29] *See* Sen. Clean Air Amendments Hearings, *supra* at 1501-02, and note 19, *supra*.

[30] *See* note 19, *supra*.

ingly,[31] opting instead for a bill that required any request from a specific source to defer the requirements of an Implementation Plan applicable to it to go through the federal postponement procedure. Senator Eagleton, a prominent draftsman of the 1970 Act, explained why:

> . . . I don't want [the public] to think we passed a clean air act that has variances depending upon the reasonable rate of implementation which goes on endlessly.[32]

A strict construction of the Act's language is also the only interpretation consistent with its structure and purposes as a whole, as the court below correctly noted:

> In a statute that constituted a "challenge to do what seem[ed] impossible," seeking to "forc[e] technology to catch up with the newly promulgated standards," it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.
>
> Section 1857c-5(f) is the device Congress chose to assure this. Congress aimed to make "variances," "postponements," or whatever departures from earlier commitments might be called, unusual and difficult to obtain.

Natural Resources Defense Council, et al. v. *Environmental Protection Agency*, 389 F.2d 390, 401-402 (5th Cir. 1974). If variances were easy to obtain, the deadlines for attaining healthful air quality, which were perhaps the most innovative aspect of the 1970 Act,

[31] For example, the Senate bill, which largely became the Act, passed by a margin of 73-0. 116 Cong. Rec. S33120 (daily ed., Sept. 22, 1970).

[32] Sen. Clean Air Amendments Hearings, *supra*, at 1502.

would become meaningless. Under the Act, each State must specify a deadline in its Plan that represents the most expeditious practicable date for attainment of the Standards. In order to reach this goal, the State relies on each regulated source to meet its timetable for compliance with the emission limitations. If, because of lenient State variance laws, the State agencies are forced to grant sources additional time, the attainment of the statutory goal will be frustrated.

What is more, the national uniformity in pollution control laws that Congress sought would be wrecked. One of the greatest reasons for the failure of the 1967 Air Quality Act to improve the air pollution problem was that by leaving to the States the setting of standards, emission limitations, and deadlines, it left them subject to whipsawing by recalcitrant industries. Polluters could often prevent the adoption of strong State regulations by threatening to move their facilities to jurisdictions with more lenient laws. This unhappy experience comprised part of the Congressional motivation for requiring uniform National Air Quality Standards and limiting the maximum time that could be taken to meet the Standards.[33] Understanding these facts from past experience, Congress concluded, after considering other mechanisms, that it must enact a tougher uniform federal variance procedure to replace the State laws, and it did.

EPA suggests, *inter alia*, that the existence of the "revision" authority provided by § 110(a)(2)(H) and (a)(3) shows Congress did not intend that all changes in compliance schedules and other individually applicable requirements be made through the postponement procedure. EPA's Brief 21. This claim, as the court below and all of the other Courts of Appeal that have reviewed the issue have agreed,[34] reflects a serious confusion of the carefully distinguished purposes and applicability of the revision and postponement provisions, the only two means of changing an Implementation Plan, once approved,[35] provided by the statute. Both words— "postponement" and "revision"—are carefully used words of art. The distinction between them is akin to that between a general revision of a zoning ordinance and a zoning variance. The revision section requires State Implementation Plans to include a procedure for revision under three circumstances:

> (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

The *revision* procedure is a device initiated by an EPA finding or action for making *general* changes in the en-

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[33] The political pressure that can be applied to prevent any State from exceeding the minimum federal requirements has been graphically illustrated once again in the States' choice of their deadlines for attaining the National Standards. Despite the Act's injunction to choose the earliest practicable attainment date, only three of the States where Primary Standards were violated picked a date earlier than the statutory maximum of three years from the date of EPA's approval of the Plan. *See* note 55, *infra*.

[34] *See infra*, at 28-30.

[35] Prior to the Administrator's approval, a State may request an "extension," which may extend the maximum time allowable for the attainment of a National Primary Standard to as much as five years. § 110(e), 42 U.S.C. § 1857c-5(e). An extension must be requested by the Governor of the State, and the State must show that (1) using all available means of controlling pollution, it will be imposible to meet the Standard; and (2) all reasonably available means of control will be applied in the interim in order to minimize the danger to public health. *See* NRDC, *et al.*, v. EPA, 475 F.2d 968 (D.C.Cir. 1973).

tire Plan. Section 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H). The *postponement* procedure, on the other hand, is initiated by an *individual source* (through his State Governor) to alter a *specific* compliance schedule, emission limitation, or other element of the Plan *as it applies to him*. Both apply from the date the State Plan is approved, but to different situations.

The word "revision" is used consistently some six times throughout § 110 of the Act to indicate a procedure for changing large portions of a State Plan upon specified findings by EPA. The primary indications of Congressional intent are § 110(a)(2)(H) and (a)(3). 42 U.S.C. § 1857c-5(a)(2)(H) and (a)(3). But the word is also used in four other places in contexts that reinforce the interpretation given here. § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1); § 110(a)(2)(A)(i), 42 U.S.C. § 1857c-5(a)(2)(A)(i); § 110(c)(1)(C), 42 U.S.C. §1857c-5(1)(C); and § 110(d), 42 U.S.C. § 1857c-5(d). Significantly, "revision" does not appear in either the postponement section or in the section that imposes a duty on the States to adopt emission limitations and compliance schedules. § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). Nor is it ever referred to in any way in connection with these sections.

Unlike the postponement procedure, which is initiated by the source-owner (through his Governor), the revision procedure is initiated by an action of EPA. § 110(a)(2)(H), 42 U.S.C. § 1857c-5(a)(2)(H). And unlike the postponements, whose purpose is to delay abatement, the purpose of revisions is to restructure State Plans to accelerate abatement or attain it in greater concert with other national goals. *Id.* The revision section requires States to provide for revising their Plans in four specified situations: (1) if the Administrator promulgates new National Air Quality Standards; (2) if new or more expeditious methods of controlling pollution become available, allowing the State to attain the existing National

Standards more quickly;[36] (3) if the Administrator finds, contrary to his earlier judgment in approving the Plan, that it is substantially inadequate to achieve the existing National Standards within the State's chosen deadlines; or (4) if the Administrator finds that the State's general emission limitations can be revised to conserve oil without preventing attainment or maintenance of the National Standards.[37]

Each of these eventualities would substantially alter the underlying basis for the entire State Plan. For example, if the Administrator were to promulgate a new National Primary Standard of 50 micrograms per cubic meter for sulfur oxides, replacing the present 80 microgram Primary Standard, each State's entire control strategy for meeting the Primary Sulfur Oxides Standard would have to be changed. A State that could meet the 80 microgram Standard by reducing the sulfur oxide emissions by 20 percent might now have to reduce them by 50 percent to meet the new Standard. In effect, such a change would require a substantially new Plan, setting new emission limitations, controlling sources which previously could have been left uncontrolled, and perhaps

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[36] Though the statute does not state that this judgment shall be reached by the Administrator, the structure of the Act suggests that such a finding would probably be made nationally. *See, e.g.*, §§ 111 and 112, 42 U.S.C. § § 1857c-6 and 1857c-7. EPA's superior research and evaluation resources, which far exceed those of any of the States, also virtually assure that EPA will make such judgments.

[37] The Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 256 (1974), added this section directing EPA to conduct a study and to notify the State if it finds that the State's general emission limitations can be revised to conserve oil without preventing attainment or maintenance of the National Standards. § 110(a)(3)(B), added by the Energy Supply and Environmental Coordination Act of 1974. But, consistent with Congress' earlier decision, based on its doubts that the National Ambient Air Quality Standards would fully protect public health, *see* note 18 *supra*, to encourage States to adopt more protective Plans, did not require the States to revise their Plans on the basis of EPA's notification.

instituting other additional types of controls contemplated by the Act. *See* § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B). For this reason, the Act provides for EPA review parallel to that for the original Plan. §§ 110(a)(3) and 110(c)(1)(C), respectively; 42 U.S.C. §§ 1857c-5(a)(3) and 1857c-5(c)(1)(C). As with the original Plan, the Administrator may approve a Plan revision only if (1) it has been subjected to public hearing, and (2) it meets the general requirements for an Implementation Plan set out in "paragraph [110(a)](2)." Section 110(a)(3), 42 U.S.C. § 1857c-5(a)(3).

B. EPA's Proposed Reading Of The Statute Has Been Rejected By The Courts Of Appeal That Have Reviewed The Issue.

Five Courts of Appeal have reviewed the issue presented here. *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 489 F.2d 390 (5th Cir. 1974) (the court below), *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973), *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974), *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1974), and *Natural Resources Defense Council, et al.*, v. *Environmental Protection Agency*, No. 72-2145, —— F.2d —— (9th Cir. Nov. 11, 1974). All five rejected EPA's interpretation of the Act's revision sections. All but one also rejected EPA's claim that pre-emption of State variance laws depended on EPA's determination of whether the requested variance would prevent attainment or maintenance of a National Ambient Air Quality Standard, holding this legally irrelevant to the question of when § 110(f) pre-empted State variance laws.

The opinion of the Fifth Circuit, the court below, is the most consistent and carefully reasoned. Canvassing the

history and regulatory scheme of the Act, and role of the postponement procedure in effectuating the Act's purposes, Judge Wisdom wrote for a unanimous court that the federal postponement provision should be strictly construed:

> We cannot accept the Administrator's reading of the statute. Nothing in the statute supports the limitation of section 1857c-5(f) to situations involving sources so large that a single variance granted it threatens the attainment of a national ambient standard. Section 1857c-5(f) speaks in terms of "*any* stationary source," and the postponement of "*any* requirement of an applicable implementation plan." This language is not ambigous and lends no basis for the construction the Administrator puts on it. [emphasis in the original.]

Natural Resources Defense Council, et al., v. *Environmental Protection Agency*, 489 F.2d 390, 401 (5th Cir. 1974).

The First Circuit, followed by the Eighth and the Second, also rejected out of hand the position now urged by EPA:

> Had Congress meant § 1857c-5(f) to be followed only if a polluter, besides violating objective State requirements [i.e., compliance schedules, emission limitations, and similar regulatory provisions of the Plan], was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? *See, e.g., Getty Oil Co.* v. *Ruckelshaus*, 342 F.Supp. 1006 (D.Del. 1972), remanded with directions, 467 F.2d 349 (3rd Cir. 1972), cert. denied 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums.

Natural Resources Defense Council, et al., v. *Environmental Protection Agency*, 478 F.2d 875, 886 (1st Cir. 1973).

The two leading courts did not reach precisely the same result, however, because the First Circuit failed to implement the logic of its reading of the statute. Rather, stating its concern that the States have "flexibility" in the period prior to the date they had promised to meet the National Standards, the court held that the federal provision pre-empted only in the "post-attainment period." 478 F.2d 875, 887. As shown below,[38] this position was considered and rejected by Congress when it passed § 110 (f), and is not in fact necessary to provide the flexibility the Court sought. With the "attainment date" fast approaching for most States, however, the practical difference between this interpretation and that of the Fifth Circuit is disappearing; and in any case, EPA's position can draw no sustenance from either of them.

C. EPA Has Abandoned In Its Own Regulations The Position It Urges On The Court Here.

EPA has repeatedly promulgated federal regulations that are premised on the fact that ambient air quality standards, though essential as the goal for State Implementation Plans and for determining the general State emission limitations, are not a proper tool for the regulation of specific sources of pollution. Until recently, however, it retained the regulation that was declared illegal by the court below. This regulation provided that:

> A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such [an individual] source(s) will not necessitate a request for a postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the

[38] *See* 34, *infra*.

> time specified in such [State Implementation] plan: *Provided, however*, that any such determination will be deemed a revision of an applicable plan under [40 C.F.R. § 51].6.

40 C.F.R. § 51.32(f), originally promulgated as 42 C.F.R. § 420.32(f), 36 Fed. Reg. 15486, 15494 (Aug. 14, 1971). In September, 1974, however, after the filing of its petition for review in this case, the Agency promulgated new regulations that revised this regulation and abandoned entirely its claims that the applicability of the federal postponement procedure depends on whether a source's request for more time would prevent the attainment or maintenance of a National Standard. These regulations also ended the Agency's attempt to find support for this position in the revision sections of the statute. 39 Fed. Reg. 34533-37, 34535 and 34572-74 (Sept. 26, 1974).

In other contexts, EPA has for some time taken the position that air quality measurements (or estimates) are not a proper mechanism for regulating individual pollution sources. For example, in proposed regulations to implement this Court's ruling on significant deterioration,[39] EPA had the following to say about one of the techniques for relating emissions from individual sources to ambient air quality:

> Current diffusion modelling techniques, when uncalibrated and used in the absence of baseline air quality data, *can exhibit random errors as high as a factor of two [100%] for short term concentrations and a factor of 1.5 [50%] for annual averages* when compared with known concentrations of pollutants. It should be noted that in assessing most average concentrations, particularly those resulting

[39] Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.D.C. 1972), aff'd per curiam without opinion by the D.C. Court of Appeals, aff'd by an equally divided Court, 412 U.S. 541 (1973).

> from multiple sources, significantly better accuracy can be obtained. However, this is not the type of application normally associated with the significant deterioration concept, which calls for pre-construction review *of individual new sources.* [emphasis supplied]

39 Fed. Reg. 31000, 31003 (Aug. 27, 1974).

The Agency has also rejected the use of so-called "intermittent" or "supplementary" controls, an alternative to emission limitations that depends on ambient air quality as the trigger for invoking control actions, on the grounds that with rare exceptions ambient air quality measurements are not adequate or enforceable with respect to individual sources.[40]

These regulations obviously conflict with the position EPA took in its original regulation concerning State variances, quoted above. Until recently, however, EPA clung to its variance regulation, even in the face of the adverse court decisions described in the previous section. In September, 1974, however, the Agency promulgated new regulations that revised its variance regulations, abandoning entirely the position the Agency now urges before this Court. These regulations revised 40 C.F.R. § 51.32(f), to read as follows:

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[40] In July, 1972, EPA rejected any use of intermittent controls because it did not believe that emissions could be related to ambient air quality with sufficient certainty to assure enforceability. 37 Fed. Reg. 15095 (July 27, 1972). In a later proposed rule-making, EPA proposed to allow the use of intermittent controls only on "isolated sources," which would "assume responsibility for all ground-level concentrations of the pollutant covered by the supplementary control system in all areas significantly affected by its emissions." Proposed Appendix P to 40 C.F.R. Part 51, 38 Fed. Reg. 25697 (Sept. 14, 1973). Perhaps because of EPA's continuing doubts about whether intermittent controls can be enforced, the Agency did not promulgate these proposed regulations. Recently it disapproved a State regulation that would have allowed the unrestricted use of intermittent controls. 39 Fed. Reg. 29357 (Aug. 15, 1974).

> A State's decision to defer the date by which a source must achieve compliance with an applicable plan provision will not necessitate a request for a postponement under this section [40 C.F.R. § 51.32] if the deferral meets the following requirements:
>
> (1) Compliance is not deferred beyond the applicable attainment date specified in Part 52 of this chapter [the date(s) chosen by the States for attainment of the National Primary and Secondary Ambient Air Quality Standards] . . . .

39 Fed. Reg. 34533, 34535 (Sept. 26, 1974).

At the same time, the Agency disapproved all State variance statutes, 39 Fed. Reg. 34535-37, promulgating new regulations for compliance schedules and proposing a substitute federal regulation to replace the disapproved variance statutes. 39 Fed. Reg. 34572, 34573. In explaining the reason for this decision, the Agency cited the decisions of four Courts of Appeal, and purported to adopt the interpretation of the statute given by the First Circuit Court of Appeals.

Because of the different interpretation of the statute rendered by the Fifth Circuit, EPA did not attempt to make these regulations binding on the States within the jurisdiction of that court. 39 Fed. Reg. 34533. But the regulations do represent a binding public declaration that the Agency has now abandoned entirely the claim that federal pre-emption of State variance laws occurs only when a proposed variance would prevent the attainment or maintenance of a National Standard, and discarded its attempt to find support for this position in the revision authority of the Clean Air Amendments. While these new regulations still do not comport with the proper interpretation of the statute given by the court below, they do evidence clearly EPA's agreement that the position it now urges before this Court cannot be supported by reference to the Clean Air Amendments.

D. The Legislative History Of The Act Demands That Postponements Be The Exclusive Means Of Relief.

The foregoing demonstrates that EPA's interpretation of the federal postponement provision cannot be squared with the language or structure of the Clean Air Amendments, with the relevant court interpretations or even with EPA's own administrative interpretation of the Clean Air Amendments. The remaining legal question is whether the Fifth Circuit, or the First, Eighth and Second, correctly interpreted the law. The Fifth Circuit's opinion, in addition to its greater faithfulness to the plain language of the statute, is also the only one consistent with the legislative history of the Act.

The legislative history of the Clean Air Amendments shows that Congress considered other schemes for dealing with variances, among them the one urged by the First Circuit, but rejected them in favor of pre-empting State variance procedures entirely. This choice was a necessary concomitant of the Congress' decision, consistent with its often-stated desire to return the air to healthful quality as quickly as possible, to require the States to meet the National Air Quality Standards "as expeditiously as practicable." Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A). *See* note 19, *supra*.

The ancestors of the provision at issue in this case were drawn on the assumption that the statutory deadline for attaining the National Standards was a flat three years. The Senate-passed bill contained two provisions for altering a State Plan. S. 4358, Sections 111(e) and (f), S. Rep. No. 91-1196, 91st Cong., 2d. Sess. (1970) at 89. Section 111(e) of the bill was plainly the forerunner of the "revision" sections (Section 110(a)(2)(H) and (a)(3) of the Act).[41] It would have pro-

[41] § 111(e) of the bill is printed at App. 34.

vided that if the Secretary[42] determined, on the basis of new studies or other information, that a State Plan was inadequate to attain the National Standards, he must give the State a chance to revise its plan; in the event that it did not, he must promulgate a revised Plan adequate to meet the Standards.

The bill would have limited revisions even more closely than the Act does; a Plan could have been revised only when the Secretary had determined it was inadequate to reach the Standards. In the Act, the revision procedure was given a slightly wider, though still circumscribed, scope, and a provision that would have allowed the Secretary to extend the State's deadline for meeting National Standards through a revision was placed in a separate section (§ 110(e), 42 U.S.C. § 1857c-5(e)) from the revision authority in order to reinforce the distinction between changes that hastened or assured attainment of healthful air quality, and those that slowed it. *See* 24-28 *supra*.

Section 111(f) of the bill was the ancestor of the present "postponement" provision, now contained in Section 110(f).[43] It would have allowed a three judge federal court, at the request of the source (conveyed through the State Governor), to grant "relief from the effect of such expiration [of the deadline for meeting National Standards]" to an individual source. That is, the court could have allowed delay in meeting the requirements of an approved Plan applicable to the source, such as

[42] At the time the Senate wrote the bill, it would have been administered by the National Air Pollution Control Administration of the Department of Health, Education, and Welfare. Before final passage of the Act, EPA was created. Thus the bill refers to the "Secretary" where the Act uses "Administrator."

[43] § 111(f) was the precursor of both the postponement and extension provisions of the Act. The extension provision is not at issue in this case. *See* note 35, *supra*. The text of proposed § 111(f) is reprinted at App. 34-36.

a compliance schedule or emission limitation. In other words, under the bill what is now the "postponement" procedure would have been confined exclusively to situations where a polluter sought to continue violating the State emission limitations beyond the bill's three year deadline meeting for the National Air Quality Standards. In short, the Senate bill, consistent with its three-year deadline for attaining the National Standards, would have pre-empted State variance laws only in the post-attainment—as it was then written, post-three year —period.[44]

The Senate bill was altered in the Conference Committee to provide that a source's attempt to delay compliance with "*any* requirement" of a State Plan would be considered a "postponement," while an enlargement of the three-year maximum time period for meeting the National Standards in an Air Quality Control Region or State as a whole would be considered an "extension." [45]

This change was necessary to conform this provision with the change in the deadline for attaining the National Primary Standards made by the Conference Committee. The Senate-passed bill would have required only that the States meet the National Standards "within three years from the date of [the Plan's] approval." S. 4358, § 111(a)(2)(A), S. Rep. No. 91-1196, 91st Cong. 2d Sess. 87 (1970).

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[44] But even the Senate bill would not have sanctioned allowing the States to control the triggering of the postponement procedure by deciding whether a polluter was causing a violation of National Standards. Under the bill, triggering would have been automatic: prior to the statutory deadlines, the postponement procedure would not have applied; after the deadline, it would have. The bill, in other words, would have adopted the First Circuit position, *see* 30, *supra*.

[45] *See* n. 35 *supra*. This change was considered important enough for comment in even the cursory discussion in the Conference Committee's Report, H. Rep. No. 91-1783, 91st Cong., 2d Sess. 45 (1970).

This language was strengthened by the Conference Committee. Seeking to assure healthful air quality as soon as possible, the Committee replaced the Senate's three-year deadline with language that required the State Plans to

> Provide for the attainment of such primary [National Air Quality] standard, *as expeditiously as practicable* but in no case later than three years from the date of [the Plan's] approval [emphasis supplied.]

§ 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Thus, the law does not leave the State free to take three years to attain the National Standards, as EPA's Brief assumes,[46] if they can accomplish it sooner. A State must provide for meeting the National Standards as soon as possible, using all the means "practicable" to accomplish this task. The earliest date "practicable" is the date the State must choose.[47]

Under the language of the Senate bill, it would have been possible for a State to grant a variance without preventing it from attaining the National Standards within the mandated deadline, since this would have been a flat three years. But under the Act this is impossible, since the States must choose to meet the Standards at the earliest "practicable" date. To attain the National Standards "as expeditiously as practicable" can have only one meaning: that the State has required the maxi-

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[46] EPA's Brief 10-12, 28.

[47] Curiously, EPA's original regulation on variances, 40 CFR § 51.32, since abandoned by the Agency (*see* 30, *supra*) also adopted Petitioners' reading of "as expeditiously as practicable." It provided that States should determine whether a proposed variance would prevent attainment of the Standards "within the time specified in such a plan," 40 CFR § 51.32(f), not "by the end of a three-year period," as would be consistent with the present interpretation adopted in EPA's Brief.

mum available controls on all sources at the earliest possible date. Thus *any* variance would, *a fortiori*, delay the attainment of the National Standards beyond the date previously considered the earliest one practicable.[45]

In short, the logic of the Act dictates that there simply are no cases where States can grant variances that will not affect their ability to meet the National Standards within the statutory deadline. EPA's claim that there are such situations amount to either (1) ignoring the fact that Congress materially altered the Senate bill in Conference, or (2) an admission that the Agency failed to meet its statutory obligation to assure that the States chose to attain the Standards at the earliest practicable date.

Against this solid evidence of Congressional intent, EPA is able to muster only an equivocal quotation from Senator Muskie in his introduction of the conference bill in the Senate. EPA's Brief 26. Discussing the federal postponement provision, he said that it would allow "A Governor [to] apply for a postponement of the deadline, if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan . . . ." 116 Cong. Rec. S42384-5 (daily ed., Dec. 18, 1970). Whether the Senator correctly referred to the "deadline" embodied in a State compliance schedule, or was merely thinking of the rejected language that had previously been included in the bill reported from his Senate Subcommittee is unclear. In any case, it is pale authority with which to refute the actual

[45] For example, a State may have provided, in its Plan, that it would meet the National Standard for sulfur oxides by the end of 1974, by requiring, among other things, large fossil-fueled power plants to install equipment to remove sulfur from their exhaust gas streams by that time. If such sources were then granted variances, perhaps because their suppliers were unable to provide the necessary equipment until six months later, the State would be forced to meet the National Standards that much later.

changes in the language of the bill made by the full Conference Committee.

II. INTERPRETING THE POSTPONEMENT PROVISION AS WRITTEN IS CRUCIAL TO THE ATTAINMENT OF THE CONGRESSIONAL PURPOSE.

In examining the policy issue presented in this case, it is important to keep in mind the purpose of the Clean Air Amendments. This law was passed because of the acknowledged hazards to human health and welfare posed by air pollution—hazards, which as anyone who walks the streets of any major American city knows, have gotten worse at a rapidly accelerating rate in the last two or three decades.

The Act was intended to reverse this trend, drastically reducing the usually unnecessary and often wasteful emissions of pollutants that produce this public health menace.

The regulatory system designed to achieve this objective is a complex one, but it is all built on a very sage judgment about human nature: people are far more likely to take a task seriously if they are given a deadline for completing it, and told that the deadline will be difficult to escape. If this Court should reach for an interpretation outside the language of the statute, as EPA urges it to, this objective will be thwarted. The force of the deadlines for attaining healthful air quality will be largely broken, and the Congressional purpose therefore subverted.

Under the postponement procedure, Congress made the granting of additional compliance time dependent on three basic factors: a history of good faith effort by the source to abate emissions, a judgment that technology to do better is not yet available, and a conclusion that the benefits of continued operation outweigh the dangers it

poses to the health and welfare of people. To ensure that these factors were judged by uniform standards, it placed the decision in EPA, rather than the 50 different State governments. It avoided having EPA make judgments about the effect of the source of ambient air quality, because, as we have seen, such a judgment cannot be made accurately, and because it knew from past experience that depending on such an uncertain standard provided recalcitrant polluters with the room for debate that would maximize pressure for concessions by regulatory agencies and for challenge in the courts, rather than the incentive to act expeditiously to control emissions.

Both the Fifth and the First Circuits understood and endorsed these sound considerations of public policy. Quoting Senator Muskie, the Fifth Circuit noted the importance of applying the postponement provision to all attempts to extend compliance schedules:

> "The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met."
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> 116 Cong. Rec. S16091 (daily ed. Sept. 21, 1970), quoted at Note *supra*, at 581. In a statute that constituted a "challenge to do what seem[ed] impossible," seeking to "forc[e] technology to catch up with the newly promulgated standards," it was essential to include a device to ensure that ambitious commitments made at the planning stage could not readily be abandoned when the time came to meet those commitments, and to assume the costs and burdens they entailed.

489 F.2d 390, ~~000~~ 401.

The First Circuit put it more succinctly:

> To allow a polluter to raise and perhaps litigate that issue [the effect of a variance on air quality] is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? *See e.g., Getty Oil* v. *Ruckelshaus*, 342 F.Supp. 1006 (D. Del. 1972), remanded with directions, 467 F.2d 349 (3rd Cir. 1972), *cert. denied*, 41 U.S.L.W. 3392 (Jan. 15, 1973), where *Getty* raised this issue in various forums.

478 F.2d 875, 886.

Throughout the other briefs before the Court, these sound considerations of public policy are hardly mentioned. Instead, both the government and the *amici curiae* intently assert, without evidence, reasons why they claim the postponement procedure will not work,[49] or will not accomplish the purpose Congress intended.[50]

The short answer to these claims, of course, is that they are irrelevant to the case before this Court. The question here is what Congress said and intended, not whether the mechanism chosen was the best one possible. *See* 21-28, *supra*. As we have shown previously, Congress considered a number of possible alternative systems for handling the problem of sources that could not, or did not want to, comply with the requirements of State Implementation plans. The one urged by the First Circuit (and EPA in its September 26, 1974, regulations) was embodied in the Senate bill, and the one supported by EPA here was contained in the House and Administra-

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[49] EPA's Brief 28-30; Brief of *amicus curiae* Edison Electric Institute 21-26.

[50] EPA's Brief 41-46; Brief of *amicus curiae* Edison Electric Institute 21-26.

tion bills. Congress heard the arguments for these alternatives, and decided to reject them. If EPA and the regulated industries disagree with that judgment, they may urge them once again on the legislature. Since these objections have been raised here, however, respondents believe the Court should be aware of their deficiencies.

A. Pre-emption Of State Variance Laws By The Federal Postponement Procedure Would Not Increase The Burden Of Administering The Clean Air Act.

Under the system urged by EPA, a request by a source for deferral of compliance beyond the end of its compliance schedule sets in motion a series of administrative determinations. In the first instance, a State agency must convene a proceeding to review the request for a variance under State law. Under most State variance laws, the agency must consider the same questions that must be considered under the federal postponement provision, as well as others. Most State laws allow the source to raise the issue of cost, a complex issue which may not be raised in a postponement proceeding.[51] In order to comply with EPA's interpretation the State must also take evidence on whether the requested variance will result in pollution exceeding the National Air Quality Standards, a question which also is not germane in a postponement proceeding.

If the State decides that a postponement proceeding is not called for, its proposed variance will undergo the "revision" procedure provided in EPA's regulations. 40 C.F.R. § 51.6. The revision process can, and frequently

[51] Congress reached its own policy decision on how to strike the balance between protection of the public and economic costs, and consistently avoided allowing the cost issue to be injected into proceedings with respect to individual sources. *See, e.g.*, S. Rep. No. 91-1196 2 (1970), and Natural Resources Defense Council, et al., v. Environmental Protection Agency, 478 F 2d 875, 888-889 (1st Cir. 1973), Natural Resources Defense Council, et al., v. Environmental Protection Agency, 489 F.2d 390, 411-413 (5th Cir. 1974).

does, take months to complete; and delays of over a year in revision approval by EPA are not uncommon. The steps in the revision process are numerous: the State must first publish notice of the proposed revision, make available the proposal, and hold a public hearing normally no sooner than 30 days after the proposal is available. 40 C.F.R. §§ 51.4, 51.6(f). The State must then consider the hearing record, formally adopt the revision, and submit it to EPA for review. 40 C.F.R. § 51.6(d). EPA then begins review and, if it determines the revision may be approvable, publishes a notice of receipt of the revision in the Federal Register, giving a minimum of 30 days for public comment. EPA apparently takes the position that it is not required to approve or disapprove such revisions within a specific period of time, for the Agency has on a number of occasions allowed more than a year to pass between the submission of a revision and EPA approval or disapproval action.[52]

Thus, the revision process is a long one and no requirements for expeditious handling are recognized by any of the participants. And, if, after analyzing a proposed State variance, EPA concludes that the variance would jeopardize a National Standard, EPA must then undertake a postponement proceeding anyway.

In short, the procedure urged by EPA is one that requires administrative duplication and examination of sev-

[52] For example, on September 10, 1973, the State of Washington submitted a proposed Plan revision to EPA. EPA published notice of receipt of this revision on November 15, 1973. 38 Fed. Reg. 31513. On September 20, 1974, a year after the revision was submitted to the Agency, EPA asked Washington State to provide additional supportive information. To date, the revision has still not been approved. *See also*, Tennessee Revision: submitted to EPA on June 27, 1973; Federal Register notice published December 14, 1973, 38 Fed. Reg. 34477; EPA approval of the revision on August 8, 1974, 39 Fed. Reg. 28528. *See also*, Connecticut Revision: State hearings held, August 9-15, 1973; submitted to EPA, January 9, 1974; EPA notice in the Federal Register, April 26, 1974, 39 Fed. Reg. 14728; EPA has still not approved it.

eral additional issues of fact. Even if the State and EPA ultimately agree that a postponement proceeding is not called for, this multi-stage process is hardly a model of dispatch. The simple fact, ignored in EPA's brief, is that any request for additional time for compliance, no matter how the agencies deal with it, will consume considerable administrative resources and time.

It would thus appear that EPA's real concern is not the total administrative costs or burden of the two alternatives, but rather the *distribution* of the burden. Under EPA's proposed scheme, the State agencies, which are largely underfunded and undermanned,[53] would be forced to share the costs of considering requests for additional time. The statutory scheme would relieve the States of these costs by placing them on EPA. While the phenomenon of bureaucratic self-protection is a well-known one, it is hardly an excuse for bending the Congressional mandate.

EPA also seems to assume that the number of requests for additional time will be the same under either its proposal or the statutory postponement system. This sugges-

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[53] According to EPA's *State Air Pollution Implementation Plan Progress Report, January 1 to June 30, 1974*:

> Control agency resources are being strained by the increased program demands being placed upon them . . . At present the control agencies are approximately 3000 man-years below the estimate of needed resources. [p. 2].
>
> The anticipated 1975 and 1977 expenditures for accomplishment of the basic SIP and anticipated revisions are approximately $188 million and $210 million, respectively. In 1974, the agencies had available approximately 69 percent of the funds stated as needed by 1975. Approximately one-third of the States spent less than 60 percent of their stated revised 1975 needs. [p. 108].

U.S. Environmental Protection Agency, Office of Air and Waste Management, Office of Air Quality Planning and Standards, Research Triangle Park, N.C., *State Air Pollution Implementation Plan Progress Report, January 1 to June 30, 1974* (1974).

tion indicates just how much the Agency has lost sight of the animating concepts of the law. For the whole purpose of enacting the postponement provision, and its certain effect, was to encourage efforts to comply by discouraging applications for more time from all but those sources that could clearly establish their inability, despite their best efforts, to meet their previously negotiated timetables for compliance. *See* discussion *supra*, at 14. If Congress was right, then the total administrative burden will be smaller if the law is construed correctly than it will be under the scheme proposed by EPA, even if each individual application requires more time for consideration. If the Congress was wrong, the net result will be to add nothing to the burden EPA and the States are already carrying. If Congress is right, the likelihood of curtailing the death, illness, and discomfort caused by pollution will be increased. EPA's proposal, which would prevent even giving the Congressional scheme a test, would have little chance of accomplishing this result.

B. The States Did Not Rely On EPA's Erroneous Interpretation Of § 110(f).

EPA's brief also claims that the Administrator's erroneous interpretation of § 110(f) was justified as a means to encourage the States to pick early dates for the expiration of compliance schedules and the attainment of National Air Quality Standards.[54] Thus the Agency says it would be unfair to the States that chose early dates in reliance on this interpretation to change the rules of the game now. This argument is mere post-hoc rationalization. EPA had no need to resort to such tactics, nor did EPA's interpretation affect the States' compliance schedules or attainment dates.

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[54] EPA's Brief 29-30, 41.

1. *EPA's Interpretation Was Not Needed to Induce the States to Choose the Most Expeditious Practicable Attainment Dates.*

The Administrator is not so impotent under the statute that he needed to coax the States into commiting themselves to meeting the National Standards expeditiously. As we have noted repeatedly, an acceptable State Plan must provide for attainment of the National Primary Standards "as expeditiously as practicable." § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A). *See* discussion *supra*, note 19. The law also mandates EPA to disapprove a Plan that adopts a later attainment date and to promulgate substitute federal regulations adopting a more expeditious date. 42 U.S.C. § 1857c-5(c). EPA has used this power liberally. *See* 37 Fed. Reg. 10842, *et seq.*, (May 21, 1972), 40 C.F.R. Part 52. The Agency can not now claim that its erroneous interpretation of § 110(f) was necessary to entice the States into complying with the law.

2. *EPA's Interpretation Had No Effect on the Attainment Dates and Compliance Schedules Chosen by the States.*

If EPA's decision to allow variances was designed to induce early attainment dates and short compliance schedules, it was a total failure. All but three of the States chose to take at least the three years' maximum time allowed in the statute for the attainment of any National Standard that was being exceeded in an AQCR.[55] Eighteen States actually sought and obtained extensions of the deadline for meeting the National Primary Standards to *beyond* three years, in many cases up to the maximum five years permitted under the "extension" provision.[56]

[55] Only the plans for Texas, Virginia and Washington, among States where the Primary Standards were violated, provided for attainment of Standards prior to mid-1975. *See* 37 Fed. Reg. 10897, 10900, 10901 (May 31, 1972).

[56] 37 Fed. Reg. 10847 *et seq.* (May 31, 1972).

§ 110(e), 42 U.S.C. § 1857c-5(e). Thus if the Court requires a return to the proper interpretation of § 110(f), it will work no injustice on the States.

The same can be said for compliance schedules. EPA's own regulations and practices with respect to compliance schedules inadvertantly prevented foreshortened expiration dates by encouraging States to negotiate and submit compliance schedules long after State Plans were approved. Though the statute provides that States were to have submitted their compliance schedules as part of their Plan (i.e., in January, 1972), § 110(a)(1) and (a)(2)(B), 42 U.S.C. § 1857c-5(a)(1) and (a)(2)(B), the Agency unilaterally extended this deadline, by regulation, until February 15, 1973.[57] Actually, few States met even that extended deadline, and EPA is still promulgating its approvals of State compliance schedules.[58] In nearly every State, in other words, the negotiation of compliance schedules occurred after respondents herein and others had filed suits across the country challenging EPA's decision to allow variances, and many, if not most, negotiations occurred after the First Circuit had declared

[57] 40 C.F.R. § 51.15(a)(2) provides

> A plan may provide that compliance schedules for individual sources or categories of sources will be formulated following submittal of the plan. Such compliance schedules shall be submitted to the Administrator within 60 days following the date such schedule is adopted but in no case later than the prescribed date for submittal of the first semiannual report required by § 51.7. . . .

40 C.F.R. § 51.7, referred to in § 51.15, provides that semi-annual reports shall be submitted to the Administrator within 45 days of the end of prescribed semi-annual reporting periods. The first semi-annual report was not due until 45 days after December 31, 1972, or February 15, 1973. Thus the net effect of the Administrator's action was to defer the date for submission of compliance schedules until February 15, 1973.

[58] EPA has still not promulgated compliance schedules for a number of States. Of the remainder, many have been promulgated during 1974. *See* 40 C.F.R. Part 52.

EPA's interpretation illegal. *Natural Resources Defense Council, et al.* v. *Environmental Protection Agency*, 478 F.2d 875, 888 (1st Cir. 1973). Both the States and the Agency were on notice long ago that variances might not be available. Their reliance, if any, was plainly unjustified.

EPA has confused this issue by its failure to require some States to correct the failure in their State laws to distinguish between compliance schedules properly agreed-to when the State Plan was adopted, and later requests for additional compliance time. Some of the State laws that were enacted before the passage of the Clean Air Amendments adopt the fiction that emission limitations are immediately effective, subject to variances for non-complying sources. In developing their Implementation Plans, these States incorporated or adopted such "immediately effective" emission limitations, and later (pursuant to EPA's lenient policy on the submission of compliance schedules) began to submit State variances to satisfy the federal requirement for compliance schedules. Among these "variances" are the several thousand in the Fifth Circuit that EPA has referred to repeatedly before this Court.[59] Indeed it is fair to say that EPA's failure to correct this error in terminology when these States' Plans were submitted in 1972 is the reason why the Agency asked this Court to review the lower court's decision.[60]

EPA actually defined the term "compliance schedule" in 1972 in a way that would, if implemented, have solved this problem. In an amendment to its regulations, EPA defined a compliance schedule as:

> The date or dates by which a source is required to comply with specific emission limitations contained in an implementation plan and with any increments of progress towards such compilance.

37 Fed. Reg. 26311 (Dec. 9, 1972), 40 C.F.R., § 51.1(p).

The accompanying definition of "increments of progress," in turn, made clear that the distinction, for purposes of federal law, between a compliance schedule and a true variance is that the former is individually negotiated as part of the Plan, while the latter is an attempt to extend a compliance schedule beyond its original expiration date. 40 C.F.R. § 51.1(q).

Thus EPA could have, and under the Act and its own regulations should have, prevented the present situation with a stroke of the pen. It still has this power. Instead, the Agency has chosen to ignore its own clarifying regulation, in the hope that it can use the ensuing confusion as a lever to coerce the courts into acceding to its incorrect interpretation of the postponement provision. This Court, like four of the five Courts of Appeal that considered the issue, should resist this attempt.

If EPA must disapprove the confused State schemes and promulgate federal regulations to take their place, that is a far better and more lawful result than for this Court to distort the plain meaning of the statute. Such a disapproval would not necessarily result in a significant burden on EPA, since it could simply promulgate a generic regulation converting *en mass* the variance-compliance schedules it has already approved into federal compliance schedules. This Court can make a clear statement that will prevent such a conversion from becoming a signal for frivolous challenges from the affected sources.

At the same time, however, EPA should be directed to clear up the grounds for the confusion which has brought this case before the Court. EPA should be ordered to disapprove prospectively all such confused State

[59] Pet. for Certiorari 8; EPA's Brief 17, 42-43.

[60] Pet. for Certiorari, 5-6, 8-9.

schemes, and to promulgate clarifying federal regulations, pursuant to its powers under § 110(c) of the Act, 42 U.S.C. § 1857c-5(c), unless the States promptly correct their deficiencies. If such an order is issued, the Court will be free to place a proper interpretation on the statutory postponement and revision authorities without concern for its effect on the administration of the Act. Plainly, EPA should not be allowed to compound its original mishandling of these State laws by distorting the language and intent of Congress.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

RICHARD E. AYRES
Attorney for Respondents

December, 1974

Ga. Code Ann. § 88-912 (1971), VARIANCES.

The Department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the Department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the Director of the Department. The Director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the Director is for the granting of a variance, the Department may do so without a hearing; provided, however, that upon the petition of any person aggrieved

by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the Department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the Department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the Department a written request for such notification.

Supreme Court, U. S.
FILED
JAN 10 1975
MICHAEL RODAK, JR., CLERK

No. 73-1742

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

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RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

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1. Respondents' attack on EPA's interpretation of the Clean Air Act — permitting treatment of variances from state requirements as revisions of state implementation plans if they will not interfere with timely attainment of national air quality standards — rests upon a confusing characterization of the actions of EPA and the states concerning variances and compliance schedules. The Act provides that EPA shall approve a state implementation plan if it includes, *inter alia*, schedules and timetables for compliance with emission limitations contained in the plan. 42 U.S.C. 1857c-5(a)(2)(B). Given the substantial and often unprecedented obligations imposed by the Act and EPA's implementing regulations, many states were unable, during the nine-month period available for adoption of state plans, to develop fully the compliance schedules

that would be needed to implement those plans. As a result, during the period following adoption of state plans and their approval by EPA, many states have developed compliance schedules — either individually negotiated or covering categories of sources. Where state emissions limitations or other requirements are already in effect, such schedules typically must be approved as variances under state law.

The primary question presented in this case is whether EPA may approve such variances and compliance schedules as "revisions" of the already-approved state plan in accordance with Section 110(a)(3) of the Act, or whether it must treat them as "postponements" subject to Section 110(f). Had the states been able to complete the development of compliance schedules within the nine-month period, such schedules, even if involving variances from state law requirements, would, of course, have been subject to approval as elements of the plan itself under Section 110 (a)(2), rather than as postponements.

Since most of the variances in question involve initial approval of compliance schedules, it is inaccurate to suggest that EPA seeks authority here only to treat as "revisions" extensions of previously-approved compliance schedules beyond expiration dates previously agreed to or otherwise established (Resp. Br. 48-49).[1]

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[1]Nor would a post-attainment date variance necessarily involve "an attempt to extend a compliance schedule beyond its original expiration date" (Resp. Br. 49). As the First, Second and Eighth Circuits have recognized, some authority to approve variances in the post-attainment period without resort to Section 110(f) should be recognized to accommodate such matters as "mechanical breakdowns and acts of God." *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F.2d 875, 886 (C.A. 1); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F.2d 690, 693-694 (C.A. 8); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F.2d 519, 523 (C.A. 2).

Respondents suggest that EPA could deal with compliance schedules submitted after EPA's approval of state plans "with a stroke of the pen," by disapproving all such state-submitted schedules, most of which EPA has now approved as revisions, and by promulgating "a generic regulation converting *en mass* the variance-compliance schedules it has already approved into federal compliance schedules" (Resp. Br. 49). Respondents presumably refer to EPA's authority to promulgate state implementation plans or portions thereof pursuant to Section 110(c) of the Act. 42 U.S.C. 1857c-5(c).

EPA's authority under Section 110(c), however, would appear to be no greater than the authority of the states themselves under Section 110(a), concerning the adoption of plans and revisions thereof. If, as respondents now contend, compliance schedules may only be treated as postponements under Section 110(f), it is doubtful whether EPA could treat them as federal revisions under Section 110(c). In any event, such an approach would be fundamentally inconsistent with the policies of state responsibility and federal-state cooperation that underlie the Act. 42 U.S.C. 1857(a)(3).

2. Respondents assert that EPA's interpretation of the Act is inconsistent with EPA's criticism, in other contexts, of attempts to relate emissions from particular sources to air quality measurements (Resp. Br. 31-32). The quoted comment, however, was directed to the substantially different problem of determining how to regulate *future* sources of pollution, particularly in open Western areas, pursuant to a separate program under the Act to prevent degradation of air quality in areas already meeting national standards.

As a matter of technology, because of the possibility of calibration and the availability of baseline data, one may, however, accurately determine the effect of an existing source of pollution in an area with known air quality. Indeed, that type of analysis lay at the heart of the states' development, and EPA's approval, of implementation plans. Cf. 40 C.F.R. 51.12, *et seq.* Congress recognized EPA's ability to make such assessments in Section 4 of the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 256 (relied upon by respondents (Resp. Br. 27, n. 37)), which amended Section 110(a)(3) of the Clean Air Act so as to require EPA to study all state plans and determine whether their emission standards relating to fuel-burning stationary sources or suppliers of fuel to such sources "can be revised * * * without interfering with the attainment and maintenance of any national ambient air quality standard * * *."

3. We have contended that EPA's original interpretation of the Act was intended to encourage states to make their limitations requirements effective earlier than mid-1975 or to adopt more rigorous standards than needed to assure timely attainment and maintenance of national standards (Pet. Br. 11, 29-30, 41). Respondents suggest that this premise was unsound because only three states established early dates for attainment of national standards (Resp. Br. 46).

In the first place, the reasonableness of EPA's interpretation would not be refuted even if it had been less effective in achieving this result than had been anticipated. In any event, respondents' reference to three states fails to distinguish between the deadline adopted by a state for attainment of national standards, and the deadline established for compliance with its emission limitations. It is true that most states where air quality exceeded national standards in 1972 established their attainment dates at the

end of the allowable three-year period.[2] In most of those same states, however, emissions limitations were made effective immediately or at dates long before the attainment date. These limitations are the crucial means to achieve timely attainment of national standards, and EPA's purpose of encouraging such immediately effective requirements, subject to necessary variances, was well-served.

4. Respondents repeatedly assert that EPA is urging upon this Court an interpretation of the Act that it has abandoned in its own regulations (*e.g.,* Resp. Br. 16-17, 30-33). In fact, EPA has never receded from its original position that Section 110(f) is not the exclusive procedure for approval of variances from state law requirements and that such variances may be treated as revisions under Section 110(a)(3).[3] All that has happened is that EPA, as a matter of policy, chose not to persist in applying its original interpretation to the post-attainment period after EPA's position concerning that period had been rejected by four courts of appeals. As indicated in our opening brief, however, we still believe that EPA's original interpretation was reasonable and should have been sustained. While that interpretation is logically applicable to the post-attainment period as well as the pre-attainment period, only the latter is covered by the question presented in the petition. If this Court reverses the court of appeals' resolution of that question, the effect of

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[2]In view of EPA's unchallenged approvals of those attainment dates it must be assumed that earlier attainment dates were not "practicable" in those states. 42 U.S.C. 1857c-5(a)(2)(A)(i).

[3]In revising its regulations, EPA reiterated its view "that compliance date deferrals which do not go beyond applicable attainment dates for primary or secondary standards should be dealt with as a plan revision * * *." 39 Fed. Reg. 34572.

the decision on EPA's authority in the post-attainment period will depend upon whether the Court follows the approach of the First Circuit, the Ninth Circuit, or EPA's original interpretation of its "revision" authority. While EPA favors the First Circuit's approach over that of the Fifth Circuit in the instant case, it would also favor its original approach or that of the Ninth Circuit over the decisions of either the First Circuit or the Fifth Circuit.

5. Respondents suggest that reversal of the court of appeals' decision will result in substantial adverse effects on the health of persons because some sources of air pollution will consequently be permitted to operate, rather than be required to shut down. This contention ignores the fact that the interpretation of the Clean Air Act we urge would permit a state to revise its implementation plan by granting a variance, subject to the approval of EPA, only if the variance would not interfere with the state's attainment or maintenance of primary air quality standards. By definition, those standards have been set by EPA at levels that, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 1857 c-4(b)(1). The Act provides a judicial remedy for those who think the standards adopted inadequate (42 U.S.C. 1857h-5(b)(1)),[4] and the present case, therefore, should

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[4]See *e.g., Kennecott Copper Corp.* v. *Environmental Protection Agency,* 462 F.2d 846 (C.A.D.C.). EPA may also be asked to exercise its authority to revise previously promulgated national standards. Cf. 42 U.S.C. 1857c-5.

be decided on the presumption that the states and EPA will adequately protect the public health by insisting that variances do not interfere with attainment or maintenance of those standards.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

No. 73-1742

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC., RESPONDENT

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS

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vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC., RESPONDENT

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS

INTEREST OF AMICUS CURIAE

The State of Texas, through the Texas Air Control Board, is responsible for implementing the federal Clean Air Act in Texas. The Board, pursuant to the provisions of the Texas Clean Air Act, utilizes a variance procedure similar to the Georgia variance procedure disallowed by the Fifth Circuit in the instant case. Under this procedure the Board has issued a number of variances allowing extensions of compliance deadlines for various lengths of time up to May 31, 1975. The Board has received notice under the Clean Air Act citizen suit provision that the validity of these variances will be challenged on the basis of the Fifth Circuit's decision.[1] Therefore, the State of Texas is critically concerned with the Court's resolution of this case.

ARGUMENT AND AUTHORITIES

(a) *Introduction*

The Clean Air Act, 42 U.S.C. § 1857c-5(a), provides that the states shall submit implementation plans to the Environmental Protection Agency which provide for the maintenance, implementation and enforcement of the national primary ambient air quality standards "as expeditiously as practicable". Pursuant to EPA's implementation plan regulations, the Texas Air Control Board submitted a plan that called for a compliance date of December 31.

[1]A copy of this notice is provided as Appendix I.

1973. The plan clearly indicated that the compliance date was selected with the understanding that a small number of sources would be unable to achieve compliance by that date. These sources, it was understood, would utilize the variance procedures contained in the Texas Clean Air Act, which was submitted and approved as a part of the state's implementation plan.

It is important, in evaluating the arguments presented by the *amicus* and the Fifth Circuit's decision, to understand the actual operation of the variance procedure in Texas. To begin with, the Texas Clean Air Act authorizes variances in strictly limited situations.[2] Only if the denial of a variance would result in (a) the arbitrary and unreasonable taking of property or (b) the practical closing of a lawful business can a variance be granted. These limited statutory provisions account for the extremely small number of variances currently outstanding in the State of Texas. Of approximately 3,000 air pollution sources in Texas, only thirteen have been issued variances. Further, these variances, based upon an administrative record after ex-

[2]Section 3.21 of the Texas Clean Air Act, TEX. REV. CIV. STAT. ANN. art. 4477-5 (Supp. 1974), provides:

> The board may grant individual variances beyond the limitations prescribed in this Act or in the rules and regulations of the board whenever it is found, upon presentation of adequate proof, that compliance with any provision of this Act, or any rule or regulation of the board, will result in an arbitrary and unreasonable taking of property, or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people . . . .

haustive public hearings, generally impose stringent interim compliance schedules.

Texas therefore believes that the position taken by the First, Second, and Eighth Circuit Courts of Appeals[3] and by EPA, allowing the granting of state variances in the period before the attainment date for national ambient air standards, achieves the goals of Congress and does so "as expeditiously as practicable".

(b) *The Fifth Circuit's construction of § 1857c-5(f) as the exclusive means of granting variances under the Clean Air Act deprives the states of flexibility necessary to implement their plans and is contrary to Congressional intent.*

In construing the pertinent provisions of the Clean Air Act involved in this case, it is important that the meaning and intent of the whole statute be considered. As this Court stated in *Richards v. United States*:

> We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." 369 U.S. 1, 11 (1962)

[3]*Natural Resources Defense Council v. Environmental Protection Agency*, 494 F.2d 519 (2nd Cir. 1974); *Natural Resources Defense Council v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973).

As shown below, the Fifth Circuit's mechanistic construction of § 1857c-5(f) vesting the Administrator of EPA with the exclusive authority to grant extensions of compliance deadlines, does violence to the goals and overall operation of the Clean Air Act.

First, the Act places the duty of controlling air pollution at its source not on the Administrator, but squarely on the states. 42 U.S.C. § 1857(a)(3) specifically states that "the prevention and control of air pollution at its source is the primary responsibility of the states and local governments"; the federal role, given a sound and well administered implementation plan, is essentially one of oversight. Consistent with this policy of state primacy, the Act requires the states, not the Administrator, to prepare and implement a plan to achieve the national ambient air quality standards established by EPA. Section 1857c-5(a)(2)(A) allows the state considerable flexibility in the attainment of these standards. The state is allowed to pick any date, up to three years after the plan's approval—i.e., before May 31, 1975 — which will achieve compliance with national primary standards "as expeditiously as practicable." As noted earlier, Texas chose December 31, 1973, as the compliance date for the regulations contained in its implementation plan, concluding that all but a handful of the 3,000 sources in the state could comply by that date and that the noncompliant few would be placed on abatement schedules via the state variance procedure and submitted to EPA as revisions or modifications of the plan.

If the procedure mandated by 42 U.S.C. § 1857c-5(f) were the only means of issuing variances from the state selected compliance dates in state implementation plans, not only would the Act's policy of state primacy in air pollution regulation be violated, but the Congressional goal of achieving the national ambient air standards as expeditiously as practicable would be frustrated. A state, unable to impose compliance schedules through a variance procedure on *certain* individual sources, might well postpone the compliance deadline for *all* sources. Congress surely cannot have intended such an anomalous result, yet this is precisely the result fostered by the decision of the Fifth Circuit. The First Circuit, by contrast, recognized the problem and concluded quite correctly that the Act

> ". . . permitt[ed] a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply."
>
> 478 F.2d at 887.

(c) *Section 1857c-5(a)(3) authorizes the Administrator of EPA to allow state variance programs.*

Section 1857c-5(a)(3) provides that the Administrator of the Environmental Protection Agency "shall approve any *revision* of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the state after reasonable notice and public hearings." (Emphasis added.) The provisions in paragraph (2) are those same general requirements laid out for the state implementation plan.

The plain language of this section would seem to authorize the Administrator to approve state-issued variances as revisions to the implementation plan as long as they otherwise complied with the Act. Such variances, imposing compliance schedules different from that generally required in the implementation plan as originally submitted to and approved by EPA, would obviously constitute "changes" or "modifications" of the plan, terms which are commonly equated with the word "revision".[4]

The Fifth Circuit arbitrarily rejected this common sense approach and, without citation of authority, blandly concluded that "[a] revision is a change in a generally applicable requirement . . . [while a] variance [is] a change in the application of a requirement to a particular party." 489 F.2d at 401. While this distinction may be "familiar and clear" to the Fifth Circuit, your *amicus* finds it remarkably novel. Not only does it fail of any linguistic or semantical sense, it does not particularly serve the purposes of the Act.

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[4]See definitions of "revise" and "revision" in WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1969) at p. 1944, and in THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1969) at p. 1112.

This Court has held that in the absence of persuasive reasons to the contrary, the words of a statute will be given their ordinary meaning. *Bank v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465, (1968).*Commissioner v. Brown*, 380 U.S. 563 (1965) (departure from ordinary meaning justified only to avoid absurd results).

Consider the following hypothetical: A state has concluded that one of only two sources of a given pollutant in a given air quality control region in the state cannot meet the general compliance deadline set forth in the implementation plan approved by EPA, but that the other source can. The state has also concluded, however, that within six months the non-compliant source can install the necessary abatement equipment to meet the regulation and that the combined contribution of the two sources in the meantime will not result in a violation of the EPA-set ambient air standard for that pollutant in that region. The state, it would seem, short of completely shutting the plant down, with the accompanying economic hardship and dislocation, has two alternatives: (a) it can issue a variance to the non-compliant source requiring that it install the necessary equipment and be in compliance in six months; or (b) it can redraw the regulation itself in such a fashion that the non-compliant source can comply. This could be done, for example, by dropping the sampling technique which causes the source to read in violation of the regulation, leaving in effect only those sampling procedures which do not yield violations.[5] Alternatives (a) and (b) would each effectively exempt the non-compliant source, but only (a) would violate the Fifth Circuit's rationale and hence require rejection by the Administrator. Alternative (b) would seemingly pass Fifth Circuit muster, since it is a "change in a generally applicable requirement." 489 F.2d at 401. As long as alternative (b) otherwise complied with § 1857c-5(a)(3), it would be approvable thereunder.

[5]A convenient example is the "opacity" sampling procedure for measuring the emission of particulates. Under this procedure a trained observer "reads" the plume coming from a source to see to what percentage degree it obscures visibility. The test is designed to control easily respirable and hence more dangerous small particles of matter. Many industries contend that, while they cannot comply with opacity measurements, they can meet the other two common tests of particulate emission—in stack concentration and property line concentration. These methods, however, rely on the weight of the particles and thus do not effectively meet the small particle problem.

In short, the Fifth Circuit's "distinction" between *revision* and *variance* is, in the true sense of the phrase, a distinction without a difference.[6] What really matters is not so much the form in which the state deals with the problems that arise in the practical administration of its implementation plan, but rather whether the method chosen will achieve compliance "as expeditiously as practicable" as required by the Act.

CONCLUSION

The decision of the Fifth Circuit is without foundation in law or logic. Not only does it contravene the Clean Air Act's policy of state primacy in the regulation of air pollution at its source, discourage the states from setting early dates for compliance with their implementation plans, and subvert the ordinary meaning of the words Congress chose in writing the Act, the decision also is in direct conflict with

[6]This is, of course, not quite accurate. There is a substantial, deleterious difference between alternatives (a) and (b) in the hypothetical discussed in the text. While alternative (a), the variance given to the one non-compliant source, ensures that the compliant source maintains the low level of emissions required by the general regulation, alternative (b), the regulation amendment method, permits the compliant source to increase emission levels.

the interpretation placed on the Act by the agency entrusted with its enforcement. As this Court noted in *Udall v. Tallman*, 380 U.S. 1 (1965), an agency's interpretation of the statute it administers is entitled to great weight and should be respected by the courts if reasonable. As Texas has shown, allowing the states to deal with isolated instances of non-compliant sources through a variance procedure, with EPA exercising its rightful role as arbiter of whether any given variance/revision meets the requirements of the Act,[7] is an eminently workable and reasonable construction of the Act.

The decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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[7]It should be noted that the Administrator's approval of any "revision" of a state implementation plan can be subjected to judicial review under 42 U.S.C. § 1857h-5(b)(1).

PROOF OF SERVICE

I, Philip K. Maxwell, one of the attorneys for the State of Texas, *amicus* herein, and a member of the Bar of the United States Supreme Court, hereby certify that, on the 22nd day of November, 1974, I served copies of the foregoing brief to the Supreme Court of the United States and on the several parties thereto as follows:

1. On Russell E. Train, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert H. Bork, Solicitor General, Wallace H. Johnson, Assistant Attorney General, Edmund W. Kitch, Assistant to the Solicitor General, Edmund B. Clark, and Henry J. Bourguinon, Attorneys, Department of Justice, Washington, D.C. 20530.

2. On the Natural Resources Defense Council, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Richard E. Ayres, Natural Resources Defense Council, Inc., 1710 N Street, N.W., Washington, D.C. 20036.

PHILIP K. MAXWELL
Assistant Attorney General

APPENDIX I

APPENDIX I

LAW OFFICES OF
J. Raymond Needham
OLD COTTON EXCHANGE
802 TRAVIS STREET
Houston, Texas 77002
TELEPHONE (713) 236-0 01

March 19, 1974

RECEIVED
MAR 20 1974
LEGAL
AIR POLLUTION CONTROL

Certified Mail No. 286266
Return Receipt Requested

Mr. Charles R. Barden
Executive Secretary
Texas Air Control Board
8520 Shoal Creek
Austin, Texas 78758

Re: Subsection 304(b) of The Clean Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C. Section 1851, et seq)

Dear Mr. Barden:

Pursuant to the provision of Subsection 304(b) of The Clean Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C. Section 1851, et seq), Sharon E. Gorman and other persons, citizens of the United States and the State of Texas, hereby serve the attached Notice as a prerequisite to commencement of a civil action under the above statute.

Very truly yours,

J. Raymond Needham

JRN:ce

Enclosure

cc: Mr. Terrence L. O'Rourke
Assistant Attorney General of Texas
One Main Plaza, Suite 325
Houston, Texas 77002

BEST COPY AVAILABLE

NOTICE

****

That

SHARON E. GORMAN
#4 BAY VILLA
BAYTOWN, TEXAS 77520

and other persons,

citizens of the United States of America and State of Texas, pursuant to subsection 304(b) of the Clean Air Act (Sec. 12,.. Public Law 91-604; 84 Stat. 1706, 42 U.S.C. §§ 1857 et seq) and 40 C.F.R. 54; 36 F.R. 23386, December 9, 1971, hereby give notice as a prerequisite to the commencement of a civil action to enforce the law and will show in the appropriate United States Courts as follows:

I.

That, the Administrator of the Environmental Protection Agency approved the State of Texas's plan for achieving the federal ambient air quality standards under the Clean Air Act Amendments of 1970. And that said plan allows Texas officials to grant variances from particular requirements of the plan. And that the plan directs Texas officials to take into account economic impact and technological feasibility in the discharge of their duties under the Texas Clean Air Act, (Article 4477-5, sec. 3.13 VACS).

II.

That, the Texas Air Control Board has granted variances from the particular requirements of the Texas Clean Air Act and rules, regulations and orders of said Board. That said variances are contrary to the requirements of the implementation plan prescribed by the Federal Clean Air Act.

III.

That certain corporations doing business in the State of Texas [the names of which are attached hereto as appendix A] from and after January 1, 1974, and each and every day thereafter have emitted and continue to emit air contaminants into the atmosphere so as to violate the emission standards and limitations required by the Texas Clean Air Act and Rules and Regulations adopted by the Texas Air Control Board, under variances issued by the Texas Air Control Board. And that said emissions into the atmosphere are unlawful.

IV.

That under the case of the Natural Resources Defense Council v. Environmental Protection Agency, Civil No. 72-2402, (5th Cir., Feb. 8, 1974), the conduct of the Administrator, Texas Air Control Board, and above mentioned corporations is clearly illegal.

Respectfully,

J. RAYMOND HERDAN
Old Cotton Exchange Building
207 Travis
Houston, Texas 77002

Attorney for Sharon E. Gorman

APPENDIX A

Alcoa (Aluminum Company of America)

American Petrofina Company

ASARCO (American Smelting & Refining Company)

Celanese Corporation

Champlin Petroleum Company

Exxon Company U.S.A.

Gulf Oil Company U.S.

Mobil Chemical Company

Phillips Petroleum Company

Rio Grande Sugar Growers

Texaco Incorporated

Texas Eastern Transmission Corporation

Union Carbide Corporation

Union Oil Company of California

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., *Respondent*

BRIEF AMICUS CURIAE

OF

EXXON CORPORATION
SHELL OIL COMPANY
CELANESE CORPORATION
MOBIL CHEMICAL CO.
UNION OIL COMPANY OF CALIFORNIA
AMERICAN PETROFINA COMPANY
GULF OIL CORPORATION
PHILLIPS PETROLEUM CO.
ATLANTIC RICHFIELD CO.
CHAMPLIN PETROLEUM CO.
ALUMINUM COMPANY OF AMERICA
RIO GRANDE VALLEY SUGAR GROWERS ASSN.

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EXXON CORPORATION
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INTEREST OF AMICUS CURIAE

The above-named companies, Exxon et al., have obtained variances from the regulations incorporated in the implementation plan for the State of Texas. Some also have variances from other State implementation plans.

10 of the 12 companies have already been given a notice under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 1857h-2, that they will be sued on the basis that the variances granted to them by the Texas Air Control Board are invalid under the Fifth Circuit's decision in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency,* 489 F.2d 390 (1974), and that as a consequence their emissions into the atmosphere are unlawful. A copy of this citizen suit notice is found in Appendix A. Thus, this brief, which is being filed with the consent of both parties, will present the views of companies which are *directly* affected by the outcome of this case.

SUMMARY OF ARGUMENT

Consistent with the provisions of the Clean Air Act,[1] the Environmental Protection Agency (EPA) has established and applied regulations which permit the States to grant variances from their implementation plans for attaining the national ambient air quality standards where the attainment of the ambient standards by the mandatory statutory deadlines will not be affected. Such variances from the emission source standards incorporated in the implementation plans are regarded as "revisions" of the States' implementation plans under 42 U.S.C. § 1857c-5 (a)(3). The EPA's interpretation of the Act as reflected in its regulations permits the States to maintain their "primary role" in developing implementation plans by giving the States sufficient flexibility to develop control strategies which will achieve the national ambient air quality standards "as expeditiously as practicable" as required by the Act. 42 U.S.C. § 1857c-5(a)(2)(A)(i). If variances can-

1. 77 Stat. 392, as added and amended by the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. §§ 1857 *et seq.*

not be granted and § 1857c-5(f) postponements are regarded as the sole deferral mechanism for attaining emission source standards, as has been held by the Fifth Circuit, there will be very little improvement in the ambient air quality until the latest possible time under the Act for attaining the ambient standards as the States will be forced to devise plans to overcome the limited relief available under § 1857c-5(f). Thus, the ambient standards will not be attained "as expeditiously as practicable."

Moreover, the EPA's interpretation of the Act should be upheld in view of the substantial reliance on this interpretation by the States and industry resulting in the granting of thousands of variances. If it is found that these variances are invalid, then many companies may have all or part of their facilities shutdown as a result of citizen suits or other enforcement actions, affecting not only the companies and their employees but also the economy and the energy situation. It is further submitted that Respondent, Natural Resources Defense Council, Inc. (NRDC), is estopped to challenge the EPA's interpretation of the Act under the doctrine of laches in view of the delay in challenging the EPA regulations before substantial reliance thereon by the States and industry.

ARGUMENT

I.

The Adverse Impact of The Fifth Circuit's Decision On The States' Role in Air Pollution Abatement and On The Attainment of The Ambient Air Quality Standards

A. Role of The States Under The Clean Air Act

The 1970 amendments to the Clean Air Act maintained state participation in air pollution prevention and control

and, in fact, mandated that the EPA cooperate with local authorities, stating that the "primary responsibility" for assuring air quality still remained with State and local governments.[2] While Federal funding and guidance were provided,[3] the Congress, realizing that air pollution was a diverse and complex problem, left it to the States to develop implementation plans, subject to EPA approval, that would result in the attainment and maintenance of the national ambient air quality standards.[4]

Section 1857c-5(a) sets forth the minimum requirements for plans developed by the States. The implementation plans must provide for the attainment of primary ambient air quality standards "as expeditiously as practicable" but in no case later than three years from the date of the approval of the plan.[5] Also to be included are "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard. . . ."[6]

B. EPA Guidelines for Implementation Plans

Besides the general statutory provisions for State implementation plans, the EPA has established additional guidelines for the States in their "Preparation, Adoption, and Submittal of Implementation Plans."[7] Through these guidelines the EPA adopted a policy consistent with the statutory provisions of the Clean Air Act which allows the

2. See 42 U.S.C. §§ 1857, 1857a and 1857c-2.
3. See, such as, 42 U.S.C. §§ 1857b, 1857b-1, 1857c and 1857c-3.
4. 42 U.S.C. § 1857c-5.
5. 42 U.S.C. § 1857c-5(a)(2)(A)(i).
6. 42 U.S.C. § 1857c-5(a)(2)(B).
7. See 36 Fed. Reg. 15486 *et seq.*, August 14, 1971, as codified at 40 C.F.R. Part 51 (1973).

States to maintain their primary role in developing implementation plans for meeting the ambient air quality standards.

With respect to the one-year postponement provision, 42 U.S.C. § 1857c-5(f), the Administrator provided in his implementation plan guidelines at 40 C.F.R. § 51.32 (f):

> "A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6."

In other words, the requirements of § 1857c-5(f) were to apply only when the deferral of any portion of control strategy regulations would affect the attainment or maintenance of the national ambient air quality standards. Deferrals in other situations only required a revision of the implementation plan by the States in accordance with the less stringent requirements of 40 C.F.R. § 51.6 (1973).[8] Thus, the EPA regulation, 40 C.F.R. § 51.32 (f), provides the States with flexibility in determining how to achieve the ambient air quality standards "as expeditiously as practicable." As will be illustrated below

8. Although revision requirements are not as stringent as those under § 1857c-5(f), public hearings are nevertheless required for all implementation plan revisions under 40 C.F.R. § 51.6(f) (1973), and the Administrator must review a revision in the same manner as he would the initial implementation plan. See 40 C.F.R. § 51.8 (1973). Although only § 1857c-5(f) specifically requires adjudicatory hearings, the variance hearings conducted by the Texas Air Control Board pursuant to 40 C.F.R. § 51.6(f) requirements were in fact adjudicatory.

this is not the case if the decision of the Fifth Circuit is upheld and § 1857c-5(f) postponements are held to be the exclusive deferral mechanism during the pre-attainment period.[9]

C. Impact of Granting Deferrals Only Under 42 U.S.C. § 1857c-5(f)

Pursuant to EPA's implementation plan regulations at 40 C.F.R. Part 51, the majority of the States within the Fifth Circuit adopted a control strategy which would result in the attainment of the ambient air quality standards as soon as practicable. Georgia, Alabama, Mississippi and Louisiana made their emission source regulations immediately effective, while Texas generally made its regulations effective on Decembr 31, 1973, essentially midway during the three-year time period for meeting the primary ambient air quality standards.[10] Under this type of control strategy, variances from emission source regulations are to be granted to only those sources which are able to demonstrate in public hearings the necessity for deferring the applicability of a regulation. Sources which make such a showing are put on attainable but expeditious compliance schedules which are monitored by the State air pollution control agencies. This procedure enables the State agencies to bring each emission source under their immediate

9. "Pre-attainment period" refers to the period prior to the statutory mandatory deadlines for attaining the national primary ambient air quality standards. This brief does not address the issues of post-attainment variances or source hardship considerations, which were decided by the Fifth Circuit, as the EPA's Petition for Certiorari was limited to the pre-attainment variance issue. None of the companies supporting this brief have variances extending into the post-attainment period.

10. See page 6 of EPA's Petition for a Writ of Certiorari. Only Florida made its emission source regulations effective at the latest possible time, generally mid-1975.

scrutiny and to compel each source to achieve compliance with the emission standards as soon as possible, thus resulting in the attainment of the ambient air quality standards "as expeditiously as practicable."

On the other hand, the position of the NRDC as adopted by the Fifth Circuit, if initially adopted by the EPA, would have restricted the States in the development of their implementation plans. If the States were limited in deferring the applicability of emission source regulations to the restrictive postponement requirements of § 1857c-5(f), the States undoubtedly would have established compliance dates at the latest possible time, generally mid-1975, so as to preclude the possibility of forcing the shutdown of numerous sources which, notwithstanding reasonable efforts and availability of technology, would not be able to meet the requirements of §1857c-5(f) due to causes beyond their control.[11] Moreover, the one-year postponement limitation of § 1857c-5(f)[12] is a further reason why the States would have probably imposed compliance dates at or near the latest possible time.[13]

11. To obtain postponements, sources must meet four stringent statutory requirements. One very difficult requirement for some companies is that continued operation must be demonstrated to be "essential to national security or to the public health or welfare." 42 U.S.C. § 1857c-5(f)(1)(D) For a liberal interpretation of this requirement, see *Note*, 52 Tex.L.Rev. 1217, 1224 (1974). In situations where there is a shortage of pollution abatement equipment or material, such as steel floating roofs for storage tanks, the lack of available technology requirement also could not be met. The same would hold true where force majeure situations occur, i.e., strikes, storms, fires, etc.

12. There is no language in § 1857c-5(f) indicating that multiple one-year postponements may be granted. Therefore, it is assumed, but not conceded, that the maximum postponement is one year.

13. For those sources having variances until mid-1975, as do many of the companies supporting this brief, a § 1857c-5(f) one-year post-

Besides restricting the States' flexibility in developing control strategies, the NRDC's interpretation of the Act would also be contrary to the intent of Congress in expeditiously reducing the level of pollutants in the ambient air. If Georgia, Alabama, Mississippi, Louisiana and Texas were forced to alter emission source compliance dates to minimize the number of sources which would have to be shutdown, sources which could easily comply with the emission source regulations in a relatively short time could delay installation of control equipment without violating the State regulations. Thus, the ambient air quality would be improved only at or near the latest possible time for meeting the standards rather than "as expeditiously as practicable", as required by the Clean Air Act.[14]

The advantages of allowing variances from emission source regulations have been recognized by the First Circuit whose opinion has been endorsed by the Eighth and Second Circuits:[15]

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ponement would not provide effective relief with respect to any regulation requiring compliance at a date within two years from the date of approval of the plan. Moreover, a regulation with a compliance date before the last possible time would preclude a source from obtaining a year extension beyond the mid-1975 date for attaining the ambient air quality standards.

14. In view of Congress' use of the word "practicable," the Clean Air Act should not be interpreted and applied so as to force the shutdown of any emission source making reasonable efforts to comply with applicable regulations prior to the mandatory deadlines for meeting the national primary ambient air quality standards. This is in accord with the general rule of statutory construction, long followed by this Court, that a statute susceptible of different meanings will be interpreted to avoid hardships. See *Burnet v. Guggenheim*, 288 U.S. 280, 285 (1933).

15. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973), and *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F.2d 519 (2nd Cir. 1974).

> "We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply." *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875, 887 (1973).

Most of the companies supporting this brief have variances from December 31, 1973 compliance date regulations until mid-1975. These companies would probably have been forced to suspend part of their operations or would have been fined in amounts up to $50,000 per day if § 1857c-5(f) were the only deferral mechanism and the compliance dates in the Texas Regulations remained unchanged. By way of illustration, the particular situation facing one of the companies supporting this brief, Exxon, is set forth in Appendix B which includes an excerpt from Exxon's testimony presented at its variance hearing on May 4, 1973. If § 1857c-5(f) were the sole deferral mechanism, it is unlikely that Exxon could have obtained any or adequate relief to develop and install wet gas scrubbing for its fluid catalytic cracking units as more than one year was required and technology, electrostatic precipitators, was available. Thus, Exxon would have been precluded from its efforts to develop and install new and improved technology, which is contrary to the policy of the Clean Air Act to "force" technology. See *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F.2d 390, 401 (5th Cir. 1974).

In summary, EPA's approach allows the State to fulfill their "primary role" under the Clean Air Act in an active and beneficial manner. On the other hand, if the EPA had adopted the Fifth Circuit's interpretation, the States

would have been deterred from seeking the earliest possible improvement in our air resources as the more stringent § 1857c-5(f) postponement procedure would have forced the States to wait until almost all emission sources had achieved the desired emission levels before any enforcement could be commenced. This effect would be directly opposite to the Congressional mandate that the primary ambient standards be achieved "as expeditiously as possible" and would also be contrary to the obvious flexibility Congress desired to give to the States in developing their own implementation plans for achieving the ambient standards. As noted by the First Circuit, § 1857c-5(f) imposes a stricter standard than is suggested by the "as expeditiously as practicable" language of § 1857c-5(a)(2)(A)(i). *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d at 887.

II.

Reliance on EPA's Interpretation of The Clean Air Act and The Adverse Impacts If that Interpretation is Not Upheld

A. Reliance by The States and Industry

As previously noted, the EPA set forth its interpretation of the § 1857c-5(f) postponement provision and its policy on the granting of variances in its regulations for the "Preparation, Adoption and Submittal of Implementation Plans." See 40 C.F.R. § 51.32(f) (1973) quoted on page 5 herein. Relying upon these regulations the States of Georgia, Alabama, Mississippi, Louisiana and Texas developed implementation plans with early compliance dates and issued over 3,000 variances.[16] Companies ob-

16. See pages 6 and 8 and footnote 6 of the EPA's Petition for a Writ of Certiorari.

taining variances have relied on the State plans and regulations as well as the variances issued by the State air pollution control agencies in the conduct of their business. However, if the EPA had interpreted that Act in the manner the Fifth Circuit did and the States had kept the same compliance dates for their emission source regulations, one or more companies would have undoubtedly challenged the unreasonableness of the compliance dates or the lack of any procedure for the granting of variances from these dates in view of the limited relief under § 1857c-5(f).

Therefore, in view of the great reliance upon the EPA's interpretation of the Clean Air Act as set forth in its regulations for preparation of implementation plans, this interpretation should be upheld. This Court has indicated that general reliance upon an administrative agency's interpretation of a statute should be given strong consideration in determining the proper interpretation. *Udall v. Tallman*, 380 U.S. 1, 18 (1965); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921).

B. Administrative Chaos

If the Fifth Circuit's decision that the § 1857c-5(f) postponement procedure is the exclusive method for deferring emission source regulations is upheld, an administrative nightmare will be created by the invalidation of over 3,000 variances in just the States comprising the Fifth Circuit. For those sources with outstanding variances at the time of a decision, requests for one-year postponements under § 1857c-5(f) would have to be promptly processed to preclude enforcement via a citizen suit, as a request for a postponement does not stay the applicability of the emission source regulation. See 40 C.F.R. § 51.32(e) (1973).

In view of the adjudicatory hearing requirement as well as the specific requirements that must be considered in granting a postponement, the hearings will be very time consuming and it is unlikely that the staffs of the EPA and the State air pollution control agencies can adequately handle any more than a few § 1857c-5(f) requests within a short time.[17] Moreover, the adjudicatory hearings required under § 1857c-5(f) would be in many respects duplicative of previous variance hearings required by EPA procedures under 40 C.F.R. § 51.6(f) (1973).

C. Impact on Industry

Even more serious than the administrative difficulties resulting from the affirmance of the Fifth Circuit's decision would be the problems facing industry. Those companies operating under variances would be immediately subject to enforcement action under the Clean Air Act. Even if the EPA in its discretion would not take legal action against those companies having variances, there is still the concern of citizen suits under 42 U.S.C. § 1857h-2. In fact, most of the companies supporting this brief were served with a notice of a citizen suit in March of 1973,[18] asserting that the variances issued to the companies are invalid under the Fifth Circuit's decision and that their emissions into the atmosphere are unlawful. Presumably, a suit has not been filed in view of this Court's stay of the decision of the Fifth Circuit. However, if the Fifth Circuit's decision is upheld, a citizen suit could be filed

17. The States presumably could revise the regulations incorporated in their implementation plans but this is also a very time-consuming process which probably cannot be accomplished prior to the mandatory deadlines for meeting primary ambient standards in mid-1975.

18. This citizen suit notice is found in Appendix A.

immediately seeking to enjoin allegedly unlawful discharges of pollutants into the atmosphere. In addition, if this decision has a retroactive effect,[19] a suit could force the EPA Administrator to take enforcement action against these companies for fines of up to $50,000 per day per violation. 42 U.S.C. § 1857c-8.

Suits for injunctive action would have the most serious impact as all or part of a company's operation could be shutdown until applicable emission limitations are met. This could have a disastrous impact on the company, its customers and the area economy. Such a situation could result even if § 1857c-5(f) hearings are requested since, as indicated above, such hearings may not be able to be concluded promptly. Moreover, some companies may not be able to meet the stringent requirements of § 1857c-5(f) and thus would be at the mercy of regulatory agency or citizen enforcement action. This could occur in situations where technology is available but notwithstanding all reasonable efforts the necessary equipment or material cannot be obtained in time to meet the compliance date requirements.

As an illustration of the impact on one particular facility, reference is made to Appendix C which includes a portion of the testimony submitted by the Exxon Corporation with respect to their variance hearing before the Texas Air Control Board on May 4, 1973. In an effort to control particulate and sulfur oxide emissions from fluid catalytic cracking units at its Baytown, Texas refinery, Exxon developed new technology, wet gas scrubbing, to reduce emissions even further than that which would

19. Even if the Fifth Circuit's decision is upheld, the great reliance on the EPA's interpretation of the Act should result in the decision having only a prospective effect.

be accomplished with existing technology, electrostatic precipitators.[20] A variance was obtained from the Texas Air Control Board on July 26, 1973 to allow Exxon time to develop and install this new wet gas scrubbing system on its fluid catalytic cracking units.

If it is held that variances cannot be issued by the States, then one fluid catalytic cracking unit at Exxon's Baytown refinery is subject to injunctive action for violation of sulfur oxide emission regulations. As indicated at page C-2 of Appendix C, the shutdown of this unit would reduce gasoline production by 3,800,000 gallons per day, which is 49% of the total capacity of the refinery, one of the largest in the country. Heating oil production would be reduced by 1,800,000 gallons per day, which is 66% of the refinery capacity, and production of other fuel products will be reduced by 340,000 gallons per day. Thus, an injunction shutting down this one unit at Exxon's refinery would have a substantial impact not only on Exxon but on the overall energy situation in this country.[21]

Thus, a decision resulting in the invalidation of all variances could possibly have almost disastrous consequences on the economy and the energy situation. The administrative chaos that would result if such a decision were rendered would probably prevent the EPA from providing any timely and effective relief under § 1857c-5(f). This possibly disastrous situation has resulted from the reliance of the States and affected companies on the EPA's interpretation of the Clean Air Act. Accordingly, EPA's reasonable construction of the Act should be upheld.

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20. See Appendix B for a discussion of the problem confronting Exxon.

21. A similar situation exists at Exxon's Bayway, New Jersey refinery.

III.

The NRDC is Estopped to Challenge The EPA's Approval of Implementation Plans Permitting the Issuance of Variances

The EPA's interpretation of the Clean Air Act with respect to the extension of compliance dates for emission sources is set forth at 40 C.F.R. § 51.32(f), which has been previously quoted herein at page 5.[22] This regulation was originally promulgated by the EPA Administrator on August 14, 1971 at 36 Fed. Reg. 15494 as 42 C.F.R. § 420.32(f).[23] As previously indicated, this regulation and others were promulgated for the purpose of aiding the States in their preparation and development of implementation plans and were relied upon by the State of Georgia and other States with respect to the implementation plans prepared and submitted to the EPA Administrator by January 31, 1972.[24]

This suit originated in June of 1972 by the NRDC's filing of a Petition for Review challenging the EPA Administrator's approval of the State of Georgia's implementation plan on May 31, 1972.[25] The EPA Administrator's approval of the Georgia plan reflects no more than the application of his interpretation of the Clean Air Act requirements set forth in his regulations on the requirements for the preparation on such plans published in the August 14, 1971 Federal Register.[26] However, by the time the

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22. Footnote 31 of the Fifth Circuit's opinion identifies this section as stating EPA's "basic position." 489 F.2d at 401.

23. This regulation was eventually recodified as 40 C.F.R. § 51.32 (f) on November 25, 1971 at 36 Fed. Reg. 22405.

24. See 37 Fed. Reg. 10842 *et seq.*, May 31, 1972.

25. See 37 Fed. Reg. 10859, promulgating 40 C.F.R. §§ 52.572-4. A few provisions of the plan were disapproved.

26. See 40 C.F.R. § 52.02(a) as found at 37 Fed. Reg. 10846, May 31, 1972.

NRDC filed its Petition for Review, there had been substantial reliance by the States as well as industry upon the EPA's interpretation of the Act concerning variances and § 1857c-5(f) postponements. Moreover, the Administrator's action on the plans of many States, including Texas, as set forth at 37 Fed. Reg. 10842 *et seq.*, May 31, 1972, were not challenged by the NRDC or any other party. Consequently, even greater reliance was placed by these States and the emission sources obtaining variances from these States on the EPA's interpretation of the Act.

Although the judicial review provision of the Clean Air Act, 42 U.S.C. 1857h-5(b), does not specifically relate to the EPA regulations promulgated on August 14, 1971, it is submitted that the NRDC is nevertheless estopped to challenge these regulations or their application in view of the substantial reliance on the regulations prior to the challenge. Because of this reliance by the States and industry, the overruling of the EPA's interpretation of the Act will result, as set forth in the previous section, in administrative chaos and possible severe and disastrous consequences to industry and the nation as a whole. If the NRDC had challenged the August 14, 1971 regulations promptly after their promulgation under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706,[27] the EPA could have taken steps to preclude any substantial reliance on the regulations by the States in the development of their implementation plans.

27. That Congress recognized the problems which would be caused by delayed challenges to actions under the Clean Air Act is witnessed by the 30-day limitation for filing Petitions for Review of the Administrator's actions. 42 U.S.C. § 1857h-2(b). It is submitted that this judicial review provision provides a guide in determining what is reasonably prompt action in challenging an action of the EPA Administrator.

This Court has recognized that a party is estopped on the grounds of laches where there is unreasonable delay in enforcing a right coupled with disadvantages to other parties. *Hays v. Port of Seattle*, 251 U.S. 233, 239 (1920); *Penn Mutual Life Insurance Co. v. City of Austin*, 168 U.S. 685, 696-701 (1898); *Triangle Improvement Council v. Ritchie*, 314 F.Supp. 20 (S.D.W.Va. 1969), aff'd 429 F.2d 423 (4th Cir. 1970), cert. den., 402 U.S. 497 (1971). Clearly the facts of this case call for the application of the doctrine of laches against the NRDC in their challenge to the EPA's interpretation of the Clean Air Act with respect to variances and § 1857c-5(f) postponements as set forth in the August 14, 1971 regulations.

CONCLUSION

It is submitted that the EPA's interpretation of the Clean Air Act concerning the granting of variances from State implementation plans should be upheld and that the decision of the Fifth Circuit Court of Appeals holding § 1857c-5(f) to be the exclusive deferral mechanism should be reversed.

Respectfully submitted,

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Washington, D. C. 20006

LARRY B. FELDCAMP
Baker & Botts
3000 One Shell Plaza
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae have been personally delivered this 22nd day of November, 1974, to the Solicitor General, counsel for Train et al., and Thomas B. Stoel, Jr. and Richard E. Ayres, counsel for National Resources Defense Council, Inc.

APPENDIX A

NOTICE

That

SHARON E. GORMAN
#4 BAY VILLA
BAYTOWN, TEXAS 77520

and other persons, citizens of the United States of America and State of Texas, pursuant to subsection 304(b) of the Clean Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C. §§ 1857 et seq) and 40 C.F.R. 54; 36 F.R. 23386, December 9, 1971, hereby give notice as a prerequisite to the commencement of a civil action to enforce the law and will show in the appropriate United States Courts as follows:

I.

That, the Administrator of the Environmental Protection Agency approved the State of Texas's plan for achieving the federal ambient air quality standards under the Clean Air Act Amendments of 1970. And that said plan allows Texas officials to grant variances from particular requirements of the plan. And that the plan directs Texas officials to take into account economic impact and technological feasibility in the discharge of their duties under the Texas Clean Air Act (Article 4477-5, sec. 3.13 VACS).

II.

That, the Texas Air Control Board has granted variances from the particular requirements of the Texas Clean

Air Act and rules, regulations and orders of said Board. That said variances are contrary to the requirements of the implementation plan prescribed by the Federal Clean Air Act.

III.

That certain corporations doing business in the State of Texas [the names of which are attached hereto as appendix A] from and after January 1, 1974, and each and every day thereafter have emitted and continue to emit air contaminants into the atmosphere so as to violate the emission standards and limitations required by the Texas Clean Air Act and Rules and Regulations adopted by the Texas Air Control Board, under variances issued by the Texas Air Control Board. And that said emissions into the atmosphere are unlawful.

IV.

That under the case of the *Natural Resources Defense Council v. Environmental Protection Agency,* Civil No. 72-2402 (5th Cir., Feb. 8, 1974), the conduct of the Administrator, Texas Air Control Board, and above mentioned corporations is clearly illegal.

Respectfully,

/s/ J. R. Needham

J. RAYMOND NEEDHAM
Old Cotton Exchange Building
202 Travis
Houston, Texas 77002
Attorney for Sharon E. Gorman

Alcoa (Aluminum Company of America)
American Petrofina Company
ASARCO (American Smelting & Refining Company)
Celanese Corporation
Champlin Petroleum Company
Exxon Company U.S.A.
Gulf Oil Company U.S.
Mobil Chemical Company
Phillips Petroleum Company
Rio Grande Sugar Growers
Texaco Incorporated
Texas Eastern Transmission Corporation
Union Carbide Corporation
Union Oil Company of California

APPENDIX B

TEXAS AIR CONTROL BOARD
PUBLIC HEARING

IN THE MATTER OF

EXXON COMPANY, U. S. A.

Houston, Texas

May 4, 1973

HEARINGS EXAMINER: Gerald R. Severson

STAFF MEMBERS PRESENT:

Tom Buckle
Tommy Ray
Sabino Gomez

* * *

(Mr. Johnson speaking from p. 14-17
of Hearing Transcript)

Mr. Johnson: * * *

. . . As the Texas regulations on particulate emissions were finalized in early 1972, it appeared that electrostatic precipitators, which I will refer to as ESP's probably from here on, it appeared that ESP's would be marginal in their ability to meet the Texas regulations on our two cat units, marginal meaning that it was not clear if ESP's could or could not meet the regulations. The primary reason for this is that the Texas regulations include so-called condensable particulates in the definition of the regulated particulate emissions. These condensable particulates, which are

primarily sulfates, exist in a gaseous form in the cat unit flue gas and are not removed by ESP's. We have some Vu-Graphs which I hope some of it you can see. Can you all see? Vu-Graph 1 shows the effect of condensable particulates using cat unit No. 2 as an example. The flue gas coming out of the carbon monoxide furnaces contains about 480 pounds per hour of catalyst fines and 85 to 100 pounds per hour of condensable particulates, for a total particulate emission rate of 565 to 580 pounds per hour. ESP's can remove about 92 percent of the catalyst fines but none of the condensables. Therefore the emissions after installation of ESP's would be about 40 pounds an hour of catalyst fines and 85 to 100 pounds an hour of condensables, for a particulate emission of 125 to 140 pounds per hour for an overall removal efficiency of 76 to 78 percent. The emission limit for cat unit No. 2, determined from Rule 105.1, is 140 pounds per hour, which means that ESP's would be marginal in meeting the Texas regulations on this particular unit. We determined that ESP's would also be marginal at our cat unit No. 3. The New Jersey regulations also include condensables in the regulated particulate emission, and Exxon's engineering staff at the Bayway, New Jersey refinery determined that ESP's could not meet the New Jersey regulations. Because of the inability of ESP's and other conventional technology to meet the New Jersey regulations and the fact that these technologies were marginal in Texas and in our desire to do a better job, our company in early 1972 began intensive engineering work to find a method for reducing cat unit particulate emissions that would meet the regulations. The problem with condensable particulates suggested the possibility of wet scrubbing, but we found that the wet scrubbing process had not been developed for use in cat unit service—or, to the best of our knowledge, even pilot

tested in this service. Therefore, we undertook laboratory and then pilot-scale wet gas scrubbing research and development, looking at several scrubber systems. Based on our studies of three different pilot plant installations and our engineering evaluation of other technologies, we have concluded that wet scrubbing is potentially the best method for control of cat unit emissions. Comparing our wet scrubbing research and development data with the more conventional means of cat unit emission control, namely ESP's, we have found that wet scrubbing is potentially a better process for several reasons. First, wet scrubbing is more efficient that ESP's for dry solids removal. Second, wet scrubbing removes condensable particulates while ESP's do not. Third, wet scrubbing removes sulfur dioxide while ESP's do not. Fourth, it is potentially more reliable than ESP's. The second Vu-Graph illustrates these wet scrubbing advantages, using the predicted performance of cat unit No. 2 as an example. At the top of the Vu-Graph, we have again shown the predicted particulate removal efficiencies using ESP's. Also shown are the approximate SO_2 emissions from our CO furnaces. Note that ESP's do not remove SO_2. At the bottom of the Vu-Graph is the predicted performance of wet gas scrubbing, which we have abbreviated WGS. Catalyst removal efficiencies are in the range of 92 to 97 percent; condensable removal efficiencies, 70 to 90 percent, for an overall removal efficiency of 88 to 96 percent. Total particulate emissions are expected to be 25 to 70 pounds per hours, compared with 125 to 140 for ESP's. Also note that SO_2 removal efficiencies are in the range of 90 to 95 percent. * * *

APPENDIX C

Exxon Company, U.S.A.
Post Office Box 3950
Baytown, Texas 77520

Refining Department
Baytown Refinery

E. T. Di Corcia
Manager

May 10, 1973

Additional Testimony
Texas Air Control Board
Hearing On Compliance Status
File: M.73 10-9-3(8)

Mr. Jerry Severson, Hearing Examiner
Texas Air Control Board
820 East 53rd Street
Austin, Texas 78751

Dear Mr. Severson:

In order to supplement the information we presented at the May 4, 1973, Texas Air Control Board public hearing on the compliance status of Exxon Company, U.S.A. with respect to Regulations I and V, we are enclosing additional testimony to be submitted into the hearing record.

This information has been notarized as is required for submission into the hearing record.

If you have questions concerning this statement, please contact Mr. J. M. Johnson at Area Code 713, 427-5711, Extension 3159.

Very truly yours,
/s/ E. T. Di Corcia

:jaa

A Division of Exxon Corporation

ADDITIONAL TESTIMONY—TEXAS AIR CONTROL BOARD HEARING ON COMPLIANCE STATUS

* * *

Economic Impact of Shutting Down FCCUs

We considered two cases in making the evaluation—shutting down both FCCUs during January 1974 and shutting down FCCU No. 3 from February 1974 to August 1975.

Shutting down both FCCU No. 3 and FCCU No. 2 during January 1974 would shut down most of the Refinery. Assuming that we would not lay off our 2,000 employees during this period, the economic loss would be $8,500,000. Gasoline production would be reduced by 6,900,000 gallons/day or 89 percent of refinery capacity. Heating oil production would drop 2,200,000 gallons/day (83 percent of capacity). Other fuel products would drop by 670,000 gallons per day.

The effect of shutting down FCCU No. 3 alone from February 1974 until August 1975, when wet gas scrubbing should be in operation, is also drastic. The total economic loss for this time period would be $80,000,000. Gasoline production would be reduced by 3,800,000 gallons per day (49 percent of total capacity); heating oil would be reduced by 1,800,000 gallons per day (66 percent of capacity); and other fuel products would be reduced by 340,000 gallons per day.

* * *

Supreme Court, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN IRON AND STEEL INSTITUTE, AS AMICUS CURIAE

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IN THE

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v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE AMERICAN IRON AND STEEL INSTITUTE, AS AMICUS CURIAE

STATEMENT OF INTEREST

This case involves the review of regulations of the Environmental Protection Agency [the "Agency"] establishing procedures for the approval of state im-

plementation plans under the Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.* [the "Act"] which include provisions authorizing the states to grant interim variances from state plans pursuant to the revision authority of section 110(a)(3) of the Act, 42 U.S.C. § 1857c-5(a)(3), prior to the effective date of the Act's mandatory attainment of primary ambient air quality standards. Five Circuit Courts of Appeals have reviewed this question. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 489 F.2d 390 (5th Cir. 1974); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 494 F.2d 519 (2d Cir. 1974); and *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* No. 72-2145 (9th Cir. Nov. 11, 1974). Four circuits, the First, Second, Eighth and Ninth, have upheld the Agency's authority to approve state implementation plans providing for state interim variance procedures, while one circuit, the Fifth, denied that the Agency has such authority. This Court's interpretation of the Clean Air Act in this instance will have significant impact on industry and governments at all levels by affecting substantial procedures now being followed to produce cleaner ambient air environment.

The American Iron and Steel Institute respectfully files this brief as *amici curiae* due to the concern of its members that affirmance of Fifth Circuit's decision will prohibit improved or expeditious methods of achieving the prescribed standards of the Act. Written consent of the parties to file a brief *amicus curiae* has been obtained under Supreme Court Rule 42.2.

The American Iron and Steel Institute [hereinafter "Institute"] is a non-profit trade association incorporated under the laws of the State of New York with principal offices at 1000 Sixteenth Street, N.W., Washington, D. C. The Institute consists of 65 member companies in the United States which employ over a half million hourly and salary people, and account for more than 95 percent of the steel produced in America.

The Institute's members are and have been subject to the standards of the Act, *see, e.g.,* 40 C.F.R. §§ 60.160-60.144 (1974), and have contributed their planning and financial resources to programs premised upon the authority of the Agency to approve states' variances from previously approved state implementation plans. To disallow this authority would thwart the full thrust of the Act and cripple the intent of the Congress. Variances to implementation plans within the terms of section 110(a)(3) are essential if the combined efforts of industry and government are "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population". 42 U.S.C. § 1857(b)(1). Significant progress has already been made toward reaching these goals and variances have played an integral role in the planning and implementation of the Act's goals. To eliminate this useful administrative tool by preventing the revision of certain implementation plans will severely handicap the industries and governments who are compelled to meet the standards of the legislation.

Accordingly, the Institute is vitally concerned with and would be immediately affected by a decision which would deny the authority of the Agency to approve interim variances granted by the states under implementation plans developed pursuant to the Act and the Agency's regulations.

In the opinion of the members of amicus, economic, technological and practicable conditions in the iron and steel industry and the communities served by the members, generally would be best served by continuing the Agency's present procedures of approving variances in state implementation plans under the Agency's revision authority, delineated in section 110(a)(3) of the Clean Air Act. 42 U.S.C. § 1857c-5(a)(3).

SUMMARY OF ARGUMENT

I

The Clean Air Act requires the Environmental Protection Agency—which it already has done—to establish national primary and secondary ambient air quality standards establishing the maximum allowable concentration of pollutants in the ambient air environment. Subsequent to the promulgation of national standards, the states developed implementation plans pursuant to the Act which vests in them the primary responsibility for implementing and maintaining programs to meet the national ambient air quality standards. The Act provides that the Agency shall approve state plans to insure that state programs will meet national ambient standards by the deadlines established under Act, generally set for mid-1975. The Act in two sections, relevant here, provides for the approval of variances from state implementation plans. In section 110(a)(3) the Agency is granted the authority to approve revisions in state implementation plans. 42 U.S.C. § 1857c-5(a)(3). In section 110(f) the Act provides a second type of variance in the form of postponements of up to one year in the effective date of an implementation plan. 42 U.S.C. § 1857c-5(f).

Under section 110(a)(2)(A), state plans implementing national primary air quality standards must provide "for the attainment of such primary standards as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan". 42 U.S.C. § 1857c-5(a)(2)(A). A state plan must further insure, under section 110(a)(2)(B), the maintenance of primary and secondary standards once they are reached by the state under section 110(2)(A). Thus, a state's implementation plan must provide for two periods of time: one when primary standards must be reached as expeditiously as practicable and a second when standards once attained must be maintained. In the first, or pre-attainment period, the Agency and states are given a degree of flexibility in revising state implementation plans. In the second, or post-attainment period, flexibility must give way to strict rules of compliance and variance therefrom. It is during this pre-attainment period in which the states are delegated, subject to Agency approval, the authority to grant variances in the form of revisions of state implementation plans, which has become the subject of this review. To deny the Agency's authority to grant revisions would be to severely handicap the states' ability to carry out their responsibilities as mandated by the Act. The postponement procedures, emboided in section 110(f), are applicable only to post-attainment problems, and thus are not controlling on

the Agency's authority to grant variances prior to the effective date of mandatory attainment of national ambient air quality standards.

II

The Clean Air Act in sections 110(c) and (d) provides that the Agency's procedures for approving state implementation are to be uniform. Throughout both sections, reference is made to the state hearing procedures (and agency procedures should the state fail to hold hearings) in terms of the implementation plan or revisions. While the legislative history is silent in this area, both sections 110(c) and (d) display a clear Congressional intent that revisions and original implementation plans must be treated uniformly.

An interpretation of the Act which permits the agency to approve interim state variances is consistent with the Court's holdings that in complex areas, such as solving the national air pollution control problem, federal agencies must have the flexibility to grant variances within the meaning of the relevant statutes. In the case of pre-attainment variances, judicial construction, tempered by reasonableness, must be applied to section 110 in order to insure flexibility by providing the Agency with the authority to approve state variances prior to the effective date of mandatory national ambient air quality deadlines. *United States* v. *Allegheny Ludlum Steel Corp.*, 406 U.S. 742 (1972).

III

The objectives of the Clean Air Act are best encouraged by upholding the Agency's authority to approve state implementation plans which provide for interim variance prior to the effective date of mandatory attainment standards. This conclusion is based on two overriding premises. First, as the four circuits supporting the agency noted, the Agency's revision procedures encourage the states to impose strict air quality limitations now, subject to individual exceptions if warranted. If the revision power is unavailable, and only the postponement procedures of section 110(f) are applicable, the states would be forced to adopt less stringent standards in order to accommodate those who could not otherwise comply, notwithstanding reasonable efforts.

Second, the states and the Agency have been proceeding since enactment of the Clean Air Act under the assumption that the revision authority would be available and utilized. For the revision procedures now to be unavailable on the eve of the effective date of mandatory standards (generally set for mid-1975) would be to disrupt the entire environmental program by calling into question the delicate balance between state and federal roles. Moreover, unavailability of the revision procedures would cause irreparable injury to industries which have been striving, under state plans and revisions thereto, to meet the mandatory attainment deadlines.

ARGUMENTS

I. The States Are Not Pre-empted by the Clean Air Act from Granting Interim Variances Under the Act's Revision Authority Prior to the Effective Date of Mandatory Attainment Deadlines.

The Clean Air Act of 1970, 42 U.S.C. § 1857c-3 *et seq.*,[1] establishes a program of air pollution control involving three major stages. The first stage is the establishment of "ambient air quality standards", by the

[1] The Clean Air Act of 1970 substantially amended the Air Quality Act of 1967. 42 U.S.C. § 1857.

Agency designating the maximum tolerable concentrations of pollutants in the ambient air.[2] The second stage is the state development of plans to bring the states up to the national standards. State plans are subject to approval by the Agency. To be approved an implementation plan must provide for the attainment of primary standards "as expeditiously as practicable" but in no case later than three years from the date of approval of such plan, and the attainment of secondary standards within a "reasonable time". 42 U.S.C. § 1857c-5(a)(A)(i) and (ii). In approving a plan the agency must further take into consideration such other factors as *inter alia* monitoring systems land use and transportation control, not relevant here. During this second stage the Act provides that the agency shall approve revisions of a state plan if it meets the requirements set forth for an original implementation plan. 42 U.S.C. § 1857c-5(a)(3).

The third stage under the Act is the maintenance of ambient air quality standards after the effective date of mandatory deadlines. The deadline for state attainment of national standards may be postponed at the request of a state governor. The Agency may grant a postponment only after the holding of an adjudicatory

[2] The Act divides the standards to be established between primary standards which are maximums allowable to protect the public health. 42 U.S.C. § 1857c-4(b)(1); and secondary standards which are maximums tolerable to protect the public welfare from any known or anticipated adverse effects. 42 U.S.C. § 1857c-4(b)(2). Section 302 of the Act defines the public welfare as:

> (h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being. 42 U.S.C. § 1857h(h).

hearing "on the record". 42 U.S.C. § 1857c-5(e) & (f). Under section 110(e) the Agency may extend the three year deadline for meeting the national primary standards for up to two years if requested by the governor when an implementation plan is submitted. 42 U.S.C. § 1857c-5(e). Section 110(f) further provides that the governor may request up until the effective date of the standard, a one year extension of the national primary standard deadline. 42 U.S.C. § 1857c-5(f).

The Act divides the responsibility for developing the programs to be applied in these three stages between the states and the federal government. In the first stage the Agency has the exclusive authority to establish national ambient air quality standards. 42 U.S.C. § 1857c-4(a). In the second stage the states have the primary authority, subject to Agency approval, to establish state implementation plans to achieve the standards set by the Agency.[3] 42 U.S.C. § 1857c-5(a). In the third stage the Act envisions shared responsibility between the state and federal government to insure that national standards once attained, are maintained. At this final stage, the Act provides strict limitations on exemptions to the standards of ambient quality once they have been obtained. 42 U.S.C. §§ 1857c-8 & d-1.

The Agency, as required by the Act, promulgated national ambient air quality standards on April 30,

[3] That the primary responsibility for solving the air pollution problem rests in the states has been a constant premise throughout the history of Congressional legislation in this area. See, *e.g.*, Air Quality Act of 1967, Pub. L. 90-145, 42 U.S.C. § 1857; Clean Air Act Amendments of 1966, Pub. L. 89-675, 42 U.S.C. § 1857; Clean Air of 1963, Pub. L. 88-206, 77 Stat. 342; Act of 1955, 69 Stat. 322.

1971 for six categories of "criteria pollutants".[4] 40 C.F.R. § 50 (1972). Accordingly 40 states, including Georgia, prepared and submitted implementation plans for approval by the Agency on January 31, 1972. 42 U.S.C. § 1857c-5. On May 31, 1972, the Agency approved portions of the Georgia state plan providing for exceptions to its implementation plan to firms who could not meet the standards within the deadline established in the state plan.[5] The Agency's approval of this portion of the Georgia plan was made pursuant to

[4] At present, there are six categories of "criteria pollutants": sulfur oxides; carbon monoxide; nitrogen dioxide; the hydrocarbons; particulate matter; and the photochemical oxidants. See 40 C.F.R. § 50 (1972).

[5] Variances under the State of Georgia implementation plan are controlled by GA. CODE § 88-912 which provides:

> **88-912. Variances.** The Department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing-down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the Department shall give consideration to the protection of the public health, saftey and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the Director of the Department. The Director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon within 15 days after notice to the petitioner. If the recommendation of the Director is for the granting of a variance, the Department may do so without a hearing; provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the Department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the Department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the Department a written request for such notification.

section 51.32(f) of the Agency's regulations which provides:

> (f) A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6. 40 C.F.R. § 51.32(f).[6]

[6] 40 C.F.R. § 51.6 provides:

> (a) The plan shall be revised from time to time, as may be necessary, to take account of:
>
> (1) Revisons of national standards,
>
> (2) The availability of improved or more expeditious methods of attaining such standards, such as improved technology or emission charges or taxes, or
>
> (3) A finding by the Administrator that the plan is substantially inadequate to attain or maintain the national standard which it implements.
>
> (b) The plan shall be revised within 60 days following notification by the Administrator under paragraph (a) of this section, or by such later date prescribed by the Administrator after consultation with the State.
>
> (c) The plan may be revised from time to time consistent with the requirements applicable to implementation plans under this part.

The Fifth Circuit in overturning the Agency's approval of the Georgia plan, held that the Agency exceeded its authority in approving a plan which permitted the state to grant variances prior to the effective date of the mandatory attainment deadlines.

The gravaman of this case is whether the Clean Air Act, 42 U.S.C. § 1857 *et seq.*, delegates to the Administrator, Environmental Protection Agency, the authority under the revision provisions enumerated in section 110(a)(3) of the Act, to approve interim variances in state implementation plans, prior to the effective date of mandatory attainment deadlines. 42 U.S.C. § 1857c-5(a)(3). The Agency asserts that the revision procedures of section 110(a)(3) delegates the Agency the authority to approve state variances prior to mandatory attainment dates. On the other hand, respondent, National Resources Defense Council, Inc. ["Council"] argues that the Agency's approval of variances circumvents the provisions of section 110(f), 42 U.S.C. § 1857c-5(f). The Council contends that Congress intended section 110(f) to be the exclusive mechanism for granting variances from requirements of state implementation plans.

Thus, the pivotal question is whether states variances are controlled by section 110(a)(3) or section 110(f) of the Act.

(d) Any revision of any regulation or any compliance schedule pursuant to paragraph (c) of this section shall be submitted to the Administrator no later than 60 days after its adoption.

(e) Revisions other than those covered by paragraphs (a) and (d) of this section shall be identified and described in the next semiannual report required by § 51.7.

(f) Any revision shall be submitted only after applicable hearing requirements of § 51.4 have been satisfied.

Section 110(a)(3) requires the Agency to approve any revision of an implementation plan if that revision meets the requirements of section 110(a)(2) and if it has been adopted by the state after reasonable notice and public hearings. Section 110(a)(3) provides:

> The Administrator *shall* approve any revision of an implementation plan applicable to an air quality control region is he determines that it meets the requirements of paragraph (2) and has been adopted by the state after reasonable notice and public hearings. 42 U.S.C. § 1857c-5(a)(3) [Emphasis supplied].

Section 110(a)(2) in turn provides in pertinent part:

> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it *provides for the attainment of such primary standard as expeditiously as practicable but* (subject to subsection (e) of this section) *in no case later than three years* from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such

primary or secondary standard, including, but not limited to, land-use and transportation controls; 42 U.S.C. § 1857c-5(a)(2) [Emphasis supplied].

On the other hand, section 110(f) establishes the standards by which postponement of an implemented plan's requirements may be granted. Postponements must be requested by the governor of the state and, if granted, may extend the compliance date up to one year. A determination to postpone the compliance date must be predicated by an adjudicatory hearing "on the record after notice to interested persons and opportunity for hearing". 42 U.S.C. § 1857c-5(f)(2)(A). Section 110(f) establishes that the following criteria must be met before a postponement can be granted:

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare.

The fundamental difference between the revision authority of section 110(a) and section 110(f) is that under section 110(a) a variance can be adopted by a state after reasonable notice and public hearings. Under section 110(f) the grant of a variance must be the subject of a full adjudicatory hearing at the federal

level. The net effect of the variance under the two sections is also quite different. A revision under section 110(a) does not extend the deadline for compliance with national ambient standards; while a postponement under section 110(f) may delay compliance with the national ambient standards for up to one year.

Pursuant to section 110(a) a state's implementation plan must provide for two periods of time: an earlier period of time during which attainment of primary standards are to be achieved as expeditiously as practicable but no later than three years from approval of state implementation plans, 42 U.S.C. § 1857c-5(a)(2) [pre-attainment period]; and a later period after which the national ambient standards, having been attained, are to be maintained [post-attainment period]. 42 U.S.C. § 1857c-5(a)(3). See, *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 494 F.2d 519 (2d Cir. 1974), *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* No. 72-2145 (9th Cir., Nov. 11, 1974).

During the pre-attainment period the states have the primary responsibilities for developing and implementing plans to meet national ambient standards. See, Remarks of Senator Copper, Senate Debate on S.4358, Sept. 21, 1970, Reprinted in S. Comm. on Pub. Works, A Legislative History of the Clean Air Amendments, 93d Cong., 2d Sess., 259 (1974). At the pre-attainment stage the Agency's role is to supervise the states' progress towards meeting mandatory ambient deadlines.

Reliance on the revision procedures of section 110(a)(3) is consistent with the legislative scheme of the Act that the states shall play the leading role in controlling pollution.[7] In particular, section 110(a)(3) of the Act establishes that state and local governments have the primary responsibility in the prevention and control of air pollution at its source. 42 U.S.C. § 1857(a)(3). *See also,* 42 U.S.C. § 1857(b)(3) providing for " . . . technical and financial assistance to State and local governments in connection with the development and execution of *their* air pollution prevention and control programs . . . ." [Emphasis supplied]. Section 107(a) of the Act further provides:

> Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such state by submitting an implementation plan for such state which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such state. 42 U.S.C. § 1857c-2(a).

The states are required by section 110(a)(2)(A) to develop implementation plans which provide for the attainment of primary ambient air quality standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval . . . " and of secondary standards "within a reasonable time". 42 U.S.C. § 1857c-5(a)(2)(A). Generally, the deadlines set for mandatory primary standards are mid-1975. To hold that the postponement provisions of section 110(f) must apply in the pre-attainment period to state variances would require the states to meet a

[7] See note 3, *supra,* and acompanying text.

stricter standard than enunciated in section 110(a)(2)'s "as expeditiously as practicable" language. 42 U.S.C. § 1857c-5(a)(2). For example, if immediately after the approval of a state implementation plan, a state decided to grant a variance, the procedures of section 110(f) would permit the state to seek only a one year postponement even though under section 110(a)(2) the state has three years to comply with the implementation plan.[8] If section 110(f) is read to cover the pre-attainment period the Act would necessarily be internally in conflict. Thus, section 110(f) in providing for a one year postponement of the mandatory date applies only to variances pertaining after the date for attainment of the national ambient air quality standards.[9]

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[8] For example, assuming section 110(f) is the exclusive procedure for granting variances and a state, such as Georgia, implements its plan effective immediately in 1972, a source of pollution which does not comply, would be required to seek a one year postponement, expiring in 1973, two years before the mandatory deadlines. Thus the one year postponement procedure could cause a source to be in violation of the standards two years prior to the effective date of attainment deadlines.

[9] That section 110(f) applies only to post-attainment variances was supported by the Council before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works wherein a representative of the Council stated that section 110(f) applied to " . . . any variance which would prevent attainment of a national standard . . . ." The Council's representative supported the Agency's regulations relating to its revision authority by commenting that assertion of that authority ". . . correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of a plan . . . ." *Hearings on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I) Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works,* 92d Cong., 2d Sess., ser. no. 92-H31, p. 45 & n. 51 (statement of Richard E. Ayres).

The only relevant legislative history to the question of the scope of section 110, is found in the Summary of the Provisions of the Conference Agreement on the Clean Air Amendments of 1970 presented by Senator Muskie, as one of the amendment's sponsors. In the Summary, the procedures of section 110(f) are described as being applicable only when the mandatory three year deadline would be affected, and not for every delay or deferral of state-imposed requirements affecting the attainment of national standards within the statutory deadlines. The Summary, in describing the procedures of section 110(e) whereby a governor may request, at the time of submitting an implementation plan, a two-year extension to the mandatory deadlines, states:

> If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of the deadline up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension. S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Serial No. 93-18, 93d Cong., 2d Sess., 132 (1974).

Immediately thereafter, the Summary in describing the application of section 110(f) to the postponement of the mandatory deadline, states:

> A Governor may also apply for a postponement of the deadline if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such a postponement is subject to judicial review.

It is clear from even this meager legislative history that section 110(f) was intended by Congress to be applied only to requests for extension for the actual deadline; not for variances granted by the states during the period prior to attainment of national ambient air quality standards.[10]

II. Original Implementation Plans Under the Clean Air Act and Revisions Thereto Are To Be Treated Uniformly by the Agency Prior to the Effective Date of Mandatory Attainment Deadlines.

The Clean Air Act in sections 110(c) and (d) presents compelling language that Congress did not intend to draw a distinction between Agency approval of revisions under section 110(a)(3) and approval of original implementation plans under section 110(a)(1)-(2). 42 U.S.C. § 1857c-5(a)-(d). Section 110(d) defines "implementation plan" under the Act to include both the original and revisions to state plans to comply

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[10] The holding of the Ninth Circuit Court of Appeals supports a much broader thesis than presented here in its holding that the Agency has the authority to grant variances under the revision section 110(a)(3) even after the attainment of national ambient air quality standards. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, No. 72-2145 (9th Cir., Nov. 11, 1974); *see also*, Comment, *Variance Procedures Under the Clean Air Act: The Need for Flexibility*, 15 WM. & M. L. REV. 324 (1973).

with the national ambient air quality standards. The text of section 110(d) provides:

> (d) For purposes of this chapter, an applicable implementation plan is the implementation plan, *or most recent revision* thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State. 42 U.S.C. § 1857c-5(d). [Emphasis supplied].

Section 110(c) in relevant part also provides that initial plans and revisions shall be subject to the same procedures:

> (c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State . . .
>
> . . . .
>
> . . . .
>
> If such State held no public hearing associated with respect to such *plan (or revision thereof)*, the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such *plan (or revision thereof)*, promulgate any such regulation unless, prior to such promulgation, such State has adopted and submitted a *plan (or revision)* which the Administrator determines to be in accordance with the requirements of this section. 42 U.S.C. § 1857c-5(c). [Emphasis supplied].

Sections 110(c) and (d) read together with sections 110(a)(3) and (2) reveal a visible legislative intent to subject both original implementation plans and revisions thereto to the same procedural requirements. See, *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, Civil No. 4597 (D. Del. 1973), reported in 6 ERC 1147 (1974), while dicta to the district court's holding that it lacks jurisdiction under the Act to review revisions, stating that "Both sections 1857c-5(d) and 1857c-5(c) display clear Congressional intent to treat revisions and original plans uniformly". 6 ERC at 1149. Thus, the Act provides that implementation plans and revisions are to be adopted only after reasonable notice and public hearings at the state level, subject to Agency approval. 42 U.S.C. § 1857c-5(a)(1). While this is not an adjudicatory hearing with all the trappings of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, the hearing must nevertheless provide adequate opportunity for public participation. See, *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495 (4th Cir. 1973); *Duquesne Light Co.* v. *Environmental Protection Agency*, 481 F.2d 1 (3rd Cir. 1973); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301 (9th Cir. 1973). Cf. *Buckeye Power, Inc.* v. *Environmental Protection Agency*, 481 F.2d 162 (6th Cir. 1973).

The obligation of the state to hold hearings on implementation plans and revisions to those plans is basic to the Act's overall scheme of vesting in the states the primary responsibility for implementing and maintaining nationally established ambient air quality standards. Denial of the Agency's authority to approve interim state variances, which have been subject to public notice and hearings, cuts across the very grain of the Act's careful delegation to the states of the authority for the creation and implementation of air quality programs, and to the Agency to supervise

state compliance. Compare, 42 U.S.C. §§ 1857(a)(3), 1857c-2, 1857c-5(a)(1)(a)(2)(A)(i).

Construction of section 110(a) to authorize Agency approval of state variances plans is supported by two recent Court decisions relating to the necessity of providing variances to rules of general applicability. *In Re Permian Basin Area Cases,* 390 U.S. 747 (1968), and *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972). In both cases, the Court held that federal agencies have the authority to issue exemptions or variances even if statutory authority is silent on the issue. In *Permian Basin, supra,* the court carefully reviewed a Federal Power Commission regulation which partially exempted several gas producers from operation of the statute. Although the court acknowledged that the rate-making provisions of the Federal Power Commission do not provide for exemptions, the court held that the grant of an exemption was within the Agency's authority.

The rationale supporting the Agency's authority to grant variances has been set forth by the court in *United States* v. *Allegheny Ludlum Steel Corp., supra,* wherein the court in ruling on the Interstate Commerce Commission's authority to grant exemptions declared:

> It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. 406 U.S. at 755.

See, *Portland Cement* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973) and *Essex Chemical Corp.* v. *Ruckelshaus,* 486 F.2d 427 (D.C. Cir. 1973) applying this principle to decisions of the Environmental Protection Agency involving section 111 of the Clean Air Act. See also, *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956) and *WAIT Radio* v. *Federal Communications Commission,* 418 F.2d 1153 (D.C. Cir. 1969) regarding application of this principle to the Federal Communications Commission.

The District of Columbia Circuit in remanding regulations involving stationary source standards for new or modified Portland Cement plans declared:

> [A] regulatory system which allows flexibility, and a lessening of firm proscriptions in a proper case, can lend strength to the system as a whole. 486 F.2d at 399.

Accord, *Essex Chemical Corp.* v. *Ruckelshaus, supra,* holding that the variance procedures of section 111 " . . . appear necessary to preserve the reasonableness of the standards as a whole . . . ." 486 F.2d at 433.

Flexibility in the pre-attainment stage is necessary to fulfill the statutory goal of clean air within the timetable established by the Agency under the Clean Air Act. It is this need for flexibility and its reasonableness which the First Circuit found pivotal in upholding the Agency's revision authority in the pre-attainment period. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 478 F.2d at 887. This need for flexibility is supported by reading sections 110(c) and (d) as necessary to preserve the reasonableness of attaining ambient standards within the national timetable. To invoke the postponement provisions of section 110(f) as the exclusive remedy for granting variances, at this stage, would be to

choke off state and Agency efforts to solve the problems of air pollution by requiring unnecessary, lengthy and time-consuming federal adjudicatory hearings. Moreover, to deny the Agency's authority to approve variances under the revision authority would be contrary to the Court's holding in *United States* v. *Allegheny Ludlum Steel Corp., supra,* that agencies possess the authority to grant exceptions when dealing with unusually complex problems.

III. Improvements of Public Health and Welfare Through the Attainment of National Ambient Air Quality Standards Is Best Encouraged by Permitting the States To Grant Variances Prior to the Mandatory Attainment Deadlines.

The First Circuit in considering the practical impact of the Agency's use of the revision authority, noted:

> A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the 'as expeditiously as practicable' language § 1857c-5(a)(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply. 478 F.2d at 887.

The First Circuit's observation merits serious consideration to the practical effects of pre-attainment stage procedures to be followed in approving state variances. One of the primary concerns of the Act's sponsors was that strict state and federal plans be implemented at the earliest practicable moment. In the Senate's considerations of the Report of the Conference Committee on the amendments to the Clean Air Act [H.R. 17255, 91st Cong.], Senator Muskie stated:

> There was little doubt in the Senate, in September [1970], that the country was facing an air pollution crisis. Cities up and down the east coast were living under clouds of smog and daily air pollution alerts. More than 200 million tons of contaminants were being spilled into the air annually.
>
> . . . .
>
> Unless we recognized the crisis and generated a sense of urgency, national lead times to find and apply central measures could melt away without any chance for a rational solution to the air pollution problem. S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Serial No. 93-18, 93d Cong., 2d Sess. 124-125 (1974).

The Agency's promulgation of 40 C.F.R. § 50.32(f) involving the revision authority should be viewed as encouraging the immediate implementation of strict ambient air quality standards. The regulations encourage the states to put into force strict standards as expeditiously as practicable, allowing exemption only for those who cannot technologically and practically meet the standards.

The Agency's revision regulations are the foundation upon which strict state implementation plans have been based. Conversely, if the postponement provisions of section 110(f) are the exclusive variance procedure, weaker state plans would have been encouraged in contravention of the Act's very *raison d'etre.*

Reliance upon section 110(f) as the exclusive variance procedure would further thwart the expeditious attainment of national ambient standards, by injecting substantial delay in reaching those standards. The rationale of the District Court in *Delaware Citizens* v. *Stauffer Chemical, supra,* while dicta to the court's holding that it lacked jurisdiction to review certain acts of the Agency, is persuasive in discussing the effect of subjecting every state request for pre-attainment variances to the federal hearing provisions of section 110(f). The court declared:

> If every revision in a control strategy, whether or not it will prevent attainment of the national standard by the date specified in the plan, necessitated a federal hearing and review by § c-5(f) standards, it could be expected that states would approach the setting of ambitious control strategies with great caution. Regulation 51.32(f) avoids this pitfall and, at the same time, it provides maximum state involvement in control strategy revisions which will not interfere with attainment of a national standard. 6 ERC at 1151.

The delay which would result if every state pre-attainment variance necessitated an adjudicatory hearing in the federal level would be insurmountable.[11]

[11] For example, if the Fifth Circuit decision were upheld the Agency would arguably be required to hold formal public adjudicatory hearings for over 800 variances granted under the Georgia state plans, most of which have already been subject to a state hearing. The magnitude of the number of hearings required if multiplied by the 50 states becomes gargantuan. Moreover, the ensuing delays would thwart the Act's very purpose of implementing standards as "expeditiously as practicable". Delays in the holding of federal hearings could run into years. *See, e.g.,* Request Submitted by Governor of West Virginia under section 110(f); hearing held in January, February and October 1974, for which a decision is still pending.

Moreover, recourse to a federal adjudicatory hearing at the pre-attainment stage runs counter to the Act's goal of attaining national ambient air standards as expeditiously as possible , [42 U.S.C. § 1857c-5(a)(2)] since the result mandated by section 110(a) is postponement of the effective date of the standards for up to one year.

Concurrent with weakening state implementation plans and delaying the attainment of national ambient air quality standards, the practical effect of relying upon section 110(f) as the exclusive variance procedure, would be the disruption of current implementation programs. The states, and industry within those states, have relied upon the Agency's revision authority in planning pollution control programs. See, *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Udall* v. *Tallman,* 380 U.S. 1 (1965) holding that where an agency interpretation has been a matter of public record and where reliance on the regulation has been at great expense, the Agency's interpretation should be given "great deference" and upheld. 401 U.S. 424, 433-434 and 380 U.S. 1, 16-18. To deny the use of the revision procedure as established by 40 C.F.R. § 51-32 in the pre-attainment period would disrupt the orderly progress now underway, to meet the national ambient air quality standards, generally set for mid-1975. The revision authority asserted here does not affect the deadline for compliance with national standards, and as such the revision authority must not be construed to proscribe approval of interim variances prior to the attainment date.

CONCLUSION

Therefore, for the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit, as it pertains to the Agency's authority to approve state

variances under section 110(a)(3), 42 U.S.C. § 1857c-5(a)(3) prior to the mandatory attainment date for national ambient air quality standards, should be reversed.

Respectfully submitted,

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Date: November 29, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

In compliance with this Court's Rule 42, Edison Electric Institute has received the written consents of counsel for the parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 198 companies that supply elec-

tricity to 77.6 percent of all the electric service customers in the United States. EEI submits this brief in support of reversal of the Fifth Circuit's decision in this case.[1]

Member companies of EEI operate some 1800 steam-electric generating plants that are subject to regulation under the Clean Air Act ("the Act") [2] and the State implementation plans adopted under the Act. Those implementation plans were initially drawn up under a statutory deadline that did not permit the accumulation and evaluation of all necessary data. Accordingly, many State plans contained limitations and deadlines that were concededly arbitrary. Since both the Act and EPA regulations gave ample latitude for plan revisions, this was not considered to be detrimental where the States included procedures to revise their plans as more data became available. Under the decision below, however, such revisions are virtually ruled out.

Under the approach taken by the Fifth Circuit, plants operated by EEI member companies may be required to comply with limitations or deadlines that are wholly unrealistic and unnecessary to achieve and maintain primary and secondary ambient air quality standards under the Act. Electric rates to the consumer have already increased dramatically as a result of inflation and soaring fuel costs. Rate increases are being sought throughout the country to finance new construction of facilities that are needed to meet future energy demands. No additional costs should be imposed on the industry and the consumer to meet pollution control requirements that go beyond those needed to protect the public health and welfare from adverse effects. The States should retain maximum flexibility, consistent with the provisions of the Act relating to implementation plans, to adjust such requirements in a realistic fashion.

Another effect of the decision below may be to force EEI member companies to use less coal and more oil or to switch from high-sulfur to low-sulfur fuels. If the States are forbidden to revise their implementation plans to permit the use of fuel on an optimum basis, the Nation's current dependence upon imported oil will only be exacerbated, and the directive of the Clean Air Act that the States achieve a level of air quality necessary to protect the public health by mid-1975 may be jeopardized.

It may be thought that the question before this Court is too narrow to evoke the concern of EEI. Since the mid-1975 deadline for compliance with National primary ambient air quality standards under the Clean Air Act is rapidly approaching, a limit on the authority of the States to grant "pre-attainment" variances (subject, of course, to EPA approval as a revision to their implementation plans) may appear to have diminishing significance. However, the rationale of the Fifth Circuit would severely restrict the authority of the States not merely to grant such "pre-attainment"

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[1] Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir. 1974). Hereinafter "Natural Resources Defense Council" will be referred to as "NRDC."

[2] 42 U.S.C. § 1857 *et seq.* (1970), *as amended*, Pub. L. No. 93-319, 88 Stat. 246 1974). For convenience, all references will be to the section numbers of the Clean Air Act rather than the United States Code; citations to both appear in the Table of Citations.

variances, but also to permit continued operation by many sources that are not interfering with primary standards. The broader implications of the decision below will continue to hamper the States long beyond 1975. Thus, the Fifth Circuit's decision is of considerable and continuing significance.

EEI urges that the decision of the lower court is neither required by the Act nor consonant with its purposes. Because of its broad impact, EEI believes that it is essential for this Court to reject the reasoning of the Fifth Circuit and reverse its holding restricting the authority of the States to adopt revisions of their air quality implementation plans.

BACKGROUND

On December 30, 1970, the Clean Air Amendments of 1970 became law.[3] Those amendments restructured the Clean Air Act and established a rigorous program for the control of air pollution through the establishment and implementation of Federal primary (health-related)[4] and secondary (welfare-related)[5] ambient air quality standards.

Under section 109 of the Act, as amended in 1970, the Administrator was to promulgate standards for five pollutants, including sulfur oxides, within 120 days of enactment.[6]

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[3] Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[4] Clean Air Act § 109(b)(1).

[5] Clean Air Act § 109(b)(2).

[6] Clean Air Act § 109(a)(1)(A). Standards for six pollutants were promulgated by the Administrator on April 30, 1971. 36 Fed. Reg. 8186 (1971); 40 C.F.R. Part 50 (1973).

Section 110(a)(1) of the Act required each State to hold hearings on, adopt, and submit to the Administrator a plan which provides for implementation, maintenance, and enforcement of each Federal primary and secondary ambient air quality standard in each "air quality control region"[7] within the State.

The States were given nine months from the promulgation of standards to submit their plans. Section 110(a)(2) of the Act required the Administrator to "approve or disapprove" the plan within four months of submission. The Administrator was directed to approve the plan if it met eight specific statutory criteria. A plan to implement a primary standard was to provide "for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . . ."[8] A plan to implement a secondary standard was to specify a "reasonable time" for attainment of the secondary standard.[9] In addition, any plan was to include "emission limitations, schedules, and timetables for compliance with such limitations and such other measures *as may be necessary to assure the attainment and maintenance*" of Federal ambient air quality standards.[10]

If the Administrator disapproved the plan or any portion thereof, he was to promulgate regulations to cure the deficiency in the plan.[11] Following approval

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[7] The entire geographical region of each State is divided into one or more "air quality control regions." Clean Air Act § 107.

[8] Clean Air Act § 110(a)(2)(A)(i).

[9] Clean Air Act § 110(a)(2)(A)(ii).

[10] Clean Air Act § 110(a)(2)(B) (emphasis added).

[11] Clean Air Act § 110(c).

or promulgation of a plan, section 110(a)(3) of the Act [12] directs the Administrator to approve any revision to a plan adopted by the State after reasonable notice and hearing that meets the requirements of section 110(a)(2). By necessary implication, so long as those requirements are met, a revision may relax, as well as tighten, specific provisions of a State implementation plan.

In addition, section 110(f) provides that "[p]rior to the date by which any source or class of sources is required to comply with any requirement of an applicable implementation plan" [13] the Governor of the State may apply to the Administrator "to postpone the applicability of such requirement . . . for not more than one year." To grant the postponement, the Administrator must find that:

a. good faith efforts have been made to comply;

b. necessary technology or alternative methods of control are not available or have not been available for a sufficient period of time;

c. any available alternative operating procedures and interim controls have reduced or will reduce the impact of the source on the public health; and

[12] Throughout this brief, reference is made to section 110(a)(3). Although the section was renumbered § 110(a)(3)(A) under Pub. L. No. 93-319, 88 Stat. 256 (1974), the original section reference is used for convenience. For discussion of § 110(a)(3)(B), see p. 20 *infra*.

[13] Clean Air Act § 110(d) defines "an applicable implementation plan" as "the implementation plan, *or most recent revision thereof*, which has been approved under subsection (a) or promulgated under subsection (c) *and which implements a national primary or secondary air quality standard within a state.*" (Emphasis added.)

d. continued operation is essential to the national security or public health and welfare.

Public notice is required, and, if requested, an adjudicatory hearing must be conducted before a section 110(f) postponement can be granted.

In August 1971 EPA established general guidelines for preparation, adoption and submission of State implementation plans.[14] EPA recognized that different sources would have different impacts on ambient levels of pollutants and that the ambient levels of pollutants would vary within a region. Accordingly, the guidelines provided that the States were not required "to adopt a control strategy uniformly applicable throughout a region unless there is no satisfactory alternative way of providing for attainment and maintenance of ambient standards throughout such region." [15] In addition, the guidelines emphasized that the States should not adopt a control strategy without considering the "cost effectiveness" and the "social or economic impact of a control strategy." [16] Finally, the regulations expressly stated that the States could revise their plans to relax requirements that proved to be more stringent than the Act required.[17]

The task facing the EPA and the States in August 1971 was staggering. Each region had to be monitored to determine whether and where ambient standards were being exceeded; all sources of pollution had to be inventoried; diffusion models had to be prepared

[14] 36 Fed. Reg 15486 (1971).

[15] 36 Fed. Reg. 15487 (1971); 40 C.F.R. § 51.2(g) (1973).

[16] 36 Fed. Reg. 15486, 15487 (1971); 40 C.F.R. § 51.2(b) (1973).

[17] 36 Fed. Reg. 15494 (1971); 40 C.F.R. § 51.32(f) (1973).

to determine what controls were required to attain the standards; the social and economic impact of alternative control strategies had to be evaluated; specific controls had to be defined; schedules had to be set to achieve compliance with those controls; hearings had to be held in each State; and EPA had to review the final product to determine whether it met the requirements of the Act.[18] All of these steps had to be completed in less than a year.

It was simply impossible for the States to perform all of the analyses required to develop a finely-tuned regulatory program within that first year. Monitoring data on source emissions and ambient concentrations of pollutants were incomplete; there was insufficient time to inventory sources and develop diffusion models to determine which sources were contributing to violations of standards; and detailed information was not available on the feasibility of, or time required for, compliance by each source with the controls proposed by the States.[19] Therefore, the States took a broad-

[18] *See generally* 116 CONG. REC. 32918 (1970) (remarks of Senator Cooper); NRDC v. EPA, 489 F.2d at 394; 36 Fed. Reg. 15486 (1971).

[19] The development of State plans to implement ambient air quality standards for nitrogen oxides provides a striking example of the imperfect nature of the plan development process. EPA's original monitoring data on nitrogen oxide concentrations disclosed violation of the standards in thirty-five States. As a result, EPA disapproved a number of State plans for their failure to impose rigid controls on nitrogen oxide emissions from stationary sources. 37 Fed. Reg. 10842 (1972). Following disapproval, EPA published proposed regulations for those plans that would have required costly modifications in existing facilities. *See, e.g.*, 37 Fed. Reg. 11826 (1972). Prior to promulgating any of these regulations, however, EPA completed a national study of nitrogen oxide ambient levels. This study showed that nitrogen oxide standards were being exceeded in only three air quality control regions in the entire country. As a result, the EPA disapproval notices and proposed regulations were withdrawn. 39 Fed. Reg. 16344 (1974).

brush approach in initially establishing control strategies. It was intended that those control strategies would be re-examined and refined later.

Most States set categorical emission limitations that applied throughout the State (or throughout a region).[20] In certain cases, those emission requirements were made effective immediately [21] while, in others, the requirements were to be effective on July 1, 1975, or some date before 1975. The States recognized, however, that such control strategies were more stringent than the Act required and therefore provided for case-by-case exceptions with the burden of proof on the source operator. Procedures were included in State plans to relax compliance dates, or even to exempt sources from the emission requirements in the plan, where compliance was not needed to attain or maintain ambient standards.[22] In addition, procedures were included to defer compliance where compliance was not technically or economically feasible.[23] Those procedures allowed the States to determine at a later date issues that could have been resolved when the plan was

[20] 37 Fed. Reg. 10843 (1972).

[21] *See, e.g.*, D.C. RULES & REGULATIONS §§ 8-2:704, 705, 706, 708, 710, 731.

[22] *See, e.g.*, MICH. ADMIN. CODE R336.49. *See also* Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974); 37 Fed. Reg. 10845-46 (1972).

[23] *See, e.g.*, GEN. LAWS R.I. § 23-25-15; IOWA CODE ANN. § 136B.13; GA. CODE ANN. § 88-912.

adopted had the States had time to develop more sophisticated control strategies in the first instance.[24]

ARGUMENT

The court below was one of four circuits to set aside the Administrator's approval of State "variance procedures" designed to provide relief from requirements in the State plan.[25] The other circuits focused on the impermissibility (except in compliance with section 110(f) of the Act) of extending compliance with requirements that were necessary to protect the public health (*i.e.*, requirements needed to attain primary standards) beyond mid-1975.[26] Each of those circuits recognized, however, that the States could revise their plans to change pre-1975 deadlines for compliance with such requirements upon a finding that compliance was

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[24] The Administrator's approval of State plans was challenged in three circuits on the ground that to comply with the control strategy set forth in the plan was not technologically or economically feasible. Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3rd Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973). Each circuit held that EPA must consider the technical and economic feasibility of compliance with a control strategy in determining whether to approve a State plan. Certainly, more petitions would have been filed had not the plans included "safety valve" procedures which established a mechanism for plan revision based on specific circumstances. *See Detroit Edison*, 469 F.2d 244 (6th Cir. 1974). *Cf.* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[25] NRDC v. EPA, 494 F.2d 519 (2d Cir. 1974); NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974); NRDC v. EPA, 483 F.2d 690 (8th Cir. 1973); NRDC v. EPA, 478 F.2d 875 (1st Cir. 1973).

[26] NRDC v. EPA, 494 F.2d at 523 (2d Cir. 1974); NRDC v. EPA, 483 F.2d at 693-94 (8th Cir. 1973); NRDC v. EPA, 478 F.2d at 887 (1st Cir. 1973).

not "practicable."[27] In contrast, the court below held that section 110(f) precluded any revision in State plans to change the date by which a source was required to comply with an approved emission limitation.[28]

Under the Fifth Circuit holding, compliance dates in the plans originally approved by the Administrator are fixed in concrete and cannot be changed even though compliance is "impracticable" or "unreasonable" or wholly unnecessary to attain and maintain ambient standards. The only relief available to the States and source operators is a "one-year postponement" under section 110(f). This is an unwarranted restriction on the authority of the States to revise their implementation plans when new evidence shows that a requirement in a plan is more stringent than the Act demands. This Court should reject the rationale of the court below that the States are precluded from adopting proposed revisions that would extend compliance deadlines in a manner consistent with section 110(a)(2) of the Act.

I.

Section 110(f) of the Act does not restrict the authority of the States to revise their implementation plans in accordance with section 110(a) of the Act.

Both the language of section 110 of the Clean Air Act and its legislative history compel rejection of the holding below that Congress intended section 110(f) to preclude the States from revising State implementation plans to change compliance deadlines.

Under the Clean Air Act, primary standards must protect the "public health" with an "adequate margin

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[27] *Id.*

[28] 489 F.2d at 401-03.

of safety" from the adverse effects of pollution.[29] Accordingly, in section 110(a), Congress directed that those standards be attained as expeditiously as practicable but not later than a fixed deadline.[30] Secondary standards, on the other hand, protect the "public welfare" against "any known or anticipated adverse effects" of pollution.[31] Because social, economic, or technological considerations may dictate delaying attainment of those standards, Congress provided that they be met within a "reasonable" time.[32] Primary and secondary standards together provide the degree of protection needed to avoid virtually any adverse effect from pollution. Thus, Congress only required the States to impose controls that are necessary to attain and maintain ambient standards.[33] Congress

[29] Clean Air Act § 109(b)(1). *See* S. REP. No. 91-1196, 91st Cong. 2d Sess. 9-10 (1970).

[30] Clean Air Act § 110(a)(2)(A)(i). *See* 116 CONG. REC. 32901-02 (1970) (remarks of Senator Muskie).

[31] Clean Air Act § 109(b)(2). The "effects on welfare" are defined to include "effects on soil, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and wellbeing." Clean Air Act § 302(h). *See* S. REP. No. 91-1196, *supra* note 29, at 11.

[32] Clean Air Act § 110(a)(2)(A)(ii). *See* H. REP. No. 91-1783, 91st Cong. 2d Sess. 45 (1970). 116 CONG. REC. 42384 (1970).

[33] Throughout the debates, State implementation plans were discussed exclusively in the context of attainment and maintenance of ambient air quality standards. 116 CONG. REC. 19200, 19204, 19205, 19206, 19207, 19209, 32918, 33116, 42382, 42384 (1970). Establishing more stringent controls was left to the discretion of the States: "[W]e say that all the states must comply with nationwide standards. *We think this is the best we can do. If any state wants stronger standards, we think it will know best what it should do or how far it should go.*" *Id.* at 19205 (remarks of Mr. Staggers) (emphasis added).

recognized that, as new information became available, the requirements of plans originally adopted by the States might prove to be more, or less, stringent than the Act required. As a result, the Act provides that States may revise their plans.[34]

In mandatory terms, section 110(a)(3) of the Act provides that the Administrator "*shall approve any revision of an implementation plan*" if it meets the requirements of section 110(a)(2) and was adopted after reasonable notice and public hearing.[35] Thus, the Act clearly authorizes the States to make "mid-course" corrections in their plans. Applying the criteria of section 110(a)(2), where compliance with a primary standards requirement is not "practicable," a plan may be revised to extend compliance up to the mandatory attainment date for primary standards. Similarly, where primary standards have been or will be achieved by the statutory deadline, a plan may be revised to extend compliance with any secondary standards requirement if compliance is not "reasonable." Finally, where compliance is not required to achieve either primary or secondary standards, a plan may be revised to extend compliance so long as the extension will not interfere with the maintenance of those standards. A source owner is not relieved from compliance with the original plan, of course, until the Administrator approves the revision submitted by the State

[34] Clean Air Act § 110(a)(3).

[35] The word "shall" indicates a mandatory intent. "Shall" is the language of command. *See* Escoe v. Zerbst, 295 U.S. 490, 493 (1935). *See also* Boyden v. Comm'r of Patents, 441 F.2d 1041, 1043 n.3 (D.C. Cir. 1971); SUTHERLAND & JABEZ, STATUTES AND STATUTORY CONSTRUCTION § 2803 (3d ed. 1943).

and, by that action, changes the implementation plan itself.[36]

Section 110(a)(3), which allows the States to make revisions to plans, is not inconsistent with section 110(f), which allows the States to request a one-year postponement in the "applicability" of a plan requirement.

Under the Act, once an implementation plan is approved by the Administrator, the requirements in that plan have the force of law and must be complied with unless and until that plan is changed to include different requirements. Section 110(f) establishes a limited exception to this general rule under which the "applicability" of an effective plan requirement may be postponed if certain rigid criteria are met.[37] In this sense, the Court below was correct in stating that section 110(f) is "the exclusive mechanism for granting *variances from requirements of state implementation plans.*"[38] Since section 110(f) does not change the plan itself, it is proper to characterize the relief as a limited "variance" from the plan requirements. It does not follow, however, that the States may not change the compliance dates of their plans under section 110(a)(3) to establish *new plan requirements.*[39]

[36] Under sections 113 (Federal Enforcement) and 304 (Citizens' Suits) of the Act, an enforcement action may be brought in Federal District Court for violation of any requirement in an applicable implementation plan. Changes in implementation plan requirements are not effective until they are approved by the Administrator as a revision to the plan. *See* Clean Air Act § 110(a)(3) and (d).

[37] Pp. 6-7 *supra.*

[38] 489 F.2d at 399.

[39] *Id.* at 401.

Where an existing plan is more stringent than the Act requires, a State has two choices: It may either seek a change in the plan requirement pursuant to section 110(a)(3) or it may request a one-year postponement in the plan requirement pursuant to section 110(f). Where the plan itself cannot be revised because a change would be inconsistent with the requirements of section 110(a)(2), a postponement under section 110(f) is the only relief available. Since postponement requests would usually be made where the delay would jeopardize attainment of primary standards by the statutory deadline, it is understandable that Congress set stringent criteria to restrict the use of section 110(f).[40]

The language of section 110(f) does not limit the authority of the States to adopt, or the duty of the Administrator to approve, any revision in a plan that satisfies the requirements of section 110(a)(2).

The court below held that the reference in section 110(f) to "*any* stationary source" and "*any* requirement of an applicable implementation plan . . . lends no basis for [a] construction" that would allow plan revisions that relax compliance dates.[41] However, while the Fifth Circuit was concentrating on the word "*any*", it was ignoring the statutory definition of "an

[40] The very structure of section 110(f) presumes a situation where primary standards are being violated. For example, the Administrator must find that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health . . . ." Clean Air Act § 110(f)(1)(C). The meager legislative history of the section discloses that it was adopted in the context of extensions in attainment of primary standards. H. REP. No. 91-1783, *supra* note 32, at 45; 116 CONG. REC. 42384 (1970).

[41] 489 F.2d at 401 (emphasis in original).

applicable implementation plan." When that definition is considered, it is clear that the lower court was mistaken in concluding that plans cannot be revised to change compliance dates.

Section 110(d) defines "an applicable implementation plan" as "the implementation plan, or *most recent revision thereof,* which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard within a state." Thus, the phrase "any requirement of *an applicable implementation plan"* does not limit the authority of the States and EPA to revise a plan. To the contrary, an "applicable implementation plan" expressly includes its "most recent revision . . . approved under subsection (a) . . . ."

The court below attempted to justify its interpretation of section 110 by asserting that "the procedures of section . . . [110](f) were to apply to *all* particular changes and those of section . . . [110](a)(3) to changes in rules of general application."[42] This unsupported assertion is then followed by a statement that "[t]here is no reason to believe that Congress intended some, indeed most, changes of a particular character should be deemed 'revisions' . . . ."[43] The Fifth Circuit's holding that the States cannot make "source specific" changes in their plans under section 110(a)(3) is without foundation.

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[42] *Id.*

[43] *Id. But see* note 55 *infra.*

First, the rationale of the Fifth Circuit is based on the assumption that section 110(f) establishes a procedure for "particular *changes."* As mentioned above, however, section 110(f) does not establish a procedure to "change" a plan; it establishes a procedure to postpone the "application" of an existing plan requirement. Thus, the conclusion that section 110(f) somehow limits the type of "changes" a State may adopt under section 110(a)(3) is premised on a false assumption.

Second, while section 110(a)(3) applies to "changes in rules of general application," there is nothing in the language of the Act to suggest that those changes cannot be of a "particular character." As mentioned above, the Act only requires the States to set limitations that are "necessary for the attainment and maintenance" of ambient standards.[44] EPA's regulations relating to implementation plans provide that the States are not required to establish "a control strategy uniformly applicable throughout a region *unless there is no satisfactory alternative way of providing for attainment and maintenance of ambient standards throughout such region."*[45] Thus, both the Act and the regulations provide for the development of sophisticated control strategies under which different sources would meet different requirements, depending upon the impact of the source on ambient standards. Furthermore, section 110(a)(2)(B) requires that plans include "schedules and timetables for compliance" with emission limitations. The time required for a particular source to comply with an emission limita-

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[44] Note 33 *supra.*

[45] 40 C.F.R. § 51.2(g) (1973).

tion will vary. Thus, this section requires (as do EPA regulations)[46] that plans include source specific compliance schedules and deadlines that are consistent with the statutory directives regarding attainment of ambient standards. Since the Act envisages that State plans include control strategies and schedules of a "particular character," it cannot be inferred that section 110(a)(3) precludes the States from adopting revisions of a "particular character."

Finally, the interpretation of the Fifth Circuit is inconsistent with the legislative history of section 110. That legislative history is replete with statements emphasizing the broad discretion given the States under section 110.[47] As Senator Muskie stated during the final debates:

> [D]uring the deliberations on the bill I have been very much interested in preserving "local option" features, so that State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs. In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution.[48]

If a State may only make "general" changes in its plan under section 110(a)(3), it must either relax requirements for all sources in a region or not revise the plan, even though a revision is needed for only

[46] 40 C.F.R. § 51.15 (1973).

[47] *See, e.g.*, 116 Cong. Rec. 19205, 19207, 32903 (1970).

[48] 116 Cong. Rec. 42386 (1970).

one source. Similarly, where only one source is creating a pollution problem, a State would be required to impose new and stringent requirements on all sources. Certainly, such a result does not allow the States to select the means of controlling pollution "that is most responsive to their air pollution problem and most responsive to their needs."

II.

Recent amendments to the Clean Air Act compel the rejection of the interpretation of the court below.

EPA has consistently interpreted section 110(a)(3) of the Act to allow the relaxation of compliance dates for individual sources through revisions to State implementation plans.[49] Predicated on this interpretation of the Act, EPA, in December 1972, formulated its "clean fuels policy" under which States were encouraged to adopt source specific revisions to their plans in a manner consistent with section 110(a)(2). On August 23, 1973, EPA reiterated its policy:

> States are encouraged again to consider the alternatives available to them within the framework of the Clean Air Act. Modification of unnecessarily restrictive emission regulations, *relaxation of final compliance dates for sources which need not be controlled to meet the primary standards,* and requests for postponements under section 110(f) are all mechanisms to alleviate the short-term fuels problem.[50]

The Fifth Circuit rejected EPA's interpretation of section 110(a)(3) and, as a result, rejected an important element of the Agency's clean fuels policy.

[49] 489 F.2d at 400-01.

[50] 38 Fed. Reg. 22736 (1973) (emphasis added). *See* pp. 23-24 *supra.*

Subsequent to the Fifth Circuit decision, Congress enacted the Energy Supply and Environmental Coordination Act of 1974 to deal with the national energy crisis.[51] Among other things, that statute amended section 110(a)(3) by adding a new subsection. The new subsection requires the Administrator to take affirmative steps to implement EPA's clean fuels policy by assisting the State to identify unnecessarily restrictive plan requirements.[52] Under section 110(a)(3)(B) of the Act, as amended, the Administrator is required to review each State plan and report to the State "whether . . . such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any ambient air quality standard within the period permitted in this section." [53]

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[51] Pub. L. No. 93-319, 88 Stat. 246 (1974).

[52] Clean Air Act § 110(a)(3)(B), Pub. L. No. 93-319, 88 Stat. 256 (1974). The Conference Report states that the intent of this provision is "to permit a mechanism by which EPA's clean fuels policy can be implemented to the extent that States agree to do so and by which conversions to the burning of coal can be effectuated more readily consistent with requirements of the Clean Air Act." H. REP. No. 93-1085, 93rd Cong. 2d Sess. 40 (1974).

[53] An earlier version of the Act would have given the Administrator even broader responsibilities and powers. The bill reported by the House Committee on Interstate and Foreign Commerce in December 1973 would have required the Administrator, not only to review State plans, but to "disapprove State plans . . . which are economically or technologically infeasible . . . ." H. REP. No. 93-710, 93rd Cong. 1st Sess. 43 (1973).

The Energy Supply and Environmental Coordination Act also amends the Clean Air Act to give the Administrator limited authority to suspend certain requirements in State implementation plans without the prior consent of the States. Clean Air Act § 119,

Thus, by its amendment, Congress has affirmed EPA's interpretation of section 110(a)(3) and has rejected the interpretation proffered by the Fifth Circuit.

III.

The interpretation of the court below may jeopardize attainment of primary standards and is not in the public interest.

The decision of the court below in effect penalizes the States for initially adopting plans that were more stringent than necessary to meet primary standards by the statutory deadline or were more stringent than necessary to achieve secondary standards within a "reasonable time." [54] It is improper to assume, as the Fifth Circuit did, that Congress intended States to ignore changed circumstances or new information and be bound forever by decisions made in early 1972. Such an assumption has no support in the legislative history of the Act [55] and ignores the reality of implementation

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Pub. L. No. 93-319, 88 Stat. 248 (1974). Such authority is new. Under the Act as passed in 1970, the Administrator did not have authority to relax implementation plan requirements on his own initiative; the States either had to request a revision under section 110(a)(3) or request a one-year postponement under section 110(f).

[54] Certainly, such a result is not in the public interest and may encourage a far more cautious approach on the part of the States in the future.

[55] *See* notes 33, 47 & 48 *supra*. To support its interpretation, the Fifth Circuit relied on statements from the legislative history relating to the importance of meeting controls necessary to protect the "health of persons" by a fixed deadline. 489 F.2d at 401. Such statements do not, however, provide any support for the proposition that the States cannot relax requirements that prove to be *more stringent* than is necessary to achieve primary standards by the statutory deadline. The court also relied on the legislative history of section 202 of the Act. *Id.* That Congress intended that technology in the automobile industry "catch up with" the auto-

plan development.[56] Moreover, the Act should not be interpreted in a way that would jeopardize attainment of primary standards by the statutory deadline. That, however, may be the result if the interpretation of the Fifth Circuit is accepted by this Court.

As discussed above, when the States adopted their plans, they lacked the time and resources to develop sophisticated control strategies. As a result, many States adopted uniform control strategies to assure that any source contributing to violations of primary standards would reduce its emissions to attain those standards. These State plans, as applied to many

mobile "*emission* standards" under section 202 is irrelevant to the authority of the States to relax requirements relating to *ambient* standards under section 110 of the Act.

Moreover, as this Court stated in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972): "It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures to allow for special circumstances." An interpretation of the Act that allows plan revisions whenever the requirements of section 110(a)(2) are met is consistent with this principle. The Fifth Circuit's interpretation is not. Even the limited relief provided by section 110(f) may not be available where, for example, a plan requirement was immediately effective. Under section 110(f), the Governor of a State must request a postponement "[*p*]*rior to the date on which any stationary source . . . is required to comply* with any requirement of an applicable implementation plan." (Emphasis added.)

[56] *Cf.* Duquesne Light Co. v. EPA, 481 F.2d 1, 9 (3rd Cir. 1973). Following the remand in Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973), the Ohio Environmental Protection Agency held extensive hearings on the limitations in the Ohio plan. The Hearing Examiners found that many of those limitations were both unnecessary and unreasonable and recommended significant changes in the Ohio plan. Hearing Examiners' Report and Recommendations, *In re* Consolidated Electric Utility Cases, No. 73-A-P-120 (Ohio EPA, Sept. 6, 1974).

sources within the State, were more stringent than the Act required. However, the Act and EPA's regulations provided for future changes in plans, and the States included procedures under which unnecessary or unreasonable requirements could be relaxed.[57]

When EPA approved State plans in May 1972, it was recognized that it might not be possible for all sources to meet the sulfur oxide requirements and deadlines that were included in most State plans.[58] With the advent of the energy crisis, many owners of sources that had planned to comply with State plans through conversions to low sulfur fuels found that they could not use such fuels.[59] Thus, compliance with deadlines that might have been reasonable when plans were adopted became impossible since those deadlines were predicated on abundant low sulfur fuel resources.

EPA soon realized that, if the sulfur oxide requirements in State plans were not changed, primary standards might not be attained by the statutory deadline. Scarce fuels and pollution control equipment were needed by sources in areas where those standards were being exceeded. Thus, EPA began actively encouraging

[57] Text pp. 8-10 *supra*.

[58] 37 Fed. Reg. 10843-44 (1972). It should be noted that EPA did not consider the technical or economic feasibility of compliance with plan requirements when it approved State plans in May 1972. *See, e.g., Buckeye Power*, 481 F.2d at 168-69.

[59] On August 29, 1973, the Energy Policy Office published proposed regulations to prohibit sources from converting to low sulfur fuels except where necessary to attain primary standards. 38 Fed. Reg. 23339 (1973). These regulations were promulgated on November 27, 1973. 38 Fed. Reg. 32577 (1973). When the Federal Energy Office was created, these regulations were re-promulgated. 39 Fed. Reg. 15137 (1974).

the States to revise their plans to defer compliance with emission controls that were more stringent than required under section 110(a)(2) of the Act. The following statement appearing in the August 23, 1973, *Federal Register* is representative of EPA's "clean fuels policy."

> [I]t is apparent that there is not enough low sulfur coal and stack gas cleaning equipment available to meet the regulations in all areas of all States in 1975. In recognition of this, the Administrator, on December 18, 1972, in a letter to the governors of the States in the areas where this fuels deficit exists, recommended that the States consider deferral of the effective dates of regulations affecting coal-burning sources of sulfur oxides where such deferral can be made without affecting attainment of the primary standards by the date required by the Act. Analysis shows that if this is done, adequate fuels and control equipment will be available for meeting all regulations necessary for attainment of the national primary ambient air quality standards by mid-1975. . . .
>
> States are encouraged again to consider the alternatives available to them within the framework of the Clean Air Act. Modification of unnecessarily restrictive emission regulations, relaxation of final compliance dates for sources which need not be controlled to meet the primary standards, and requests for postponements under section 110(f) are all mechanisms to alleviate the short-term fuels problem.[60]

At the time that State "variance" procedures achieved critical importance both from the standpoint of meeting the objectives of the Clean Air Act and

[60] 38 Fed. Reg. 22736 (1973).

from the standpoint of our national energy policy, the Fifth Circuit held that the States were precluded from using those procedures to adopt proposed revisions to their plans. Developments since that decision underline the need for flexibility in the administration of air quality controls and rejection of the Fifth Circuit holding.

First, it is now clear that fuel resources must be allocated to reduce the Nation's dependence on imported oil. Where American coal can be burned instead of foreign oil, without jeopardy to the public health, air quality regulations should be capable of ready adjustment to promote the use of domestic energy resources.

Second, it is now recognized that the availability of pollution-control equipment is limited. What is available should be channeled by regulation to those specific sources or areas where it is most needed, free of artificial requirements for uniform regulation.

Third, the capital-intensive utility industry is currently faced with a financial crisis: The inability to raise needed capital in a depressed market. To the extent that capital funds can be raised at all, they should be spent on pollution control that is acutely needed or on construction of generating facilities required to meet future energy demands.

Confirmation by this Court of the authority of the individual States to change plan requirements on a case-by-case basis will help insure that scarce economic and energy resources are used in a manner consistent with the public interest.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fifth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondent.

AMICUS CURIAE BRIEF OF STATE OF MISSOURI

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AMICUS CURIAE BRIEF OF STATE OF MISSOURI

INTEREST OF AMICUS CURIAE

This case presents the question whether under the Clean Air Act, 42 U.S.C. §1857, *et seq.*, variances from particular requirements of the state implementation plans are allowed, or whether Section 110(f) of the Act, 42 U.S.C. §1857c-5(f), is the only vehicle for deferring the application of a standard, limitation, time schedule or other requirement of a state implementation plan.[1] The State of

1. 42 U.S.C. §1857c-5(f) authorizes the Governor to apply for, and EPA to approve, a postponement of any requirement of an applicable implementation plan for a period of one year upon certain conditions. This postponement can be requested only up to the date on which a source or class of sources is required to meet the applicable requirement.

Section 110(e) of the Act, 42 U.S.C. §1857c-5(e), provides for an extension of the date for attaining a national primary ambient air quality standard for a period of up to two years beyond the three-year date specified by 42 U.S.C. §1857c-5(a)(2)(A)(i). However, 42 U.S.C. §1857c-5(e) is not at issue in this case, as an application for such extension can be made only at the time a state implementation plan is submitted. The deadline for submission of such plans was May 31, 1972.

Missouri, through the Missouri Air Conservation Commission, is responsible for formulating and enforcing its implementation plan. The state's Air Pollution Control Law, Sections 203.010 to 203.195, RSMo 1969, as amended, contains a variance procedure similar to that of the State of Georgia, and almost identical to that of *amicus curiae*, State of Texas.[2]

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2. §203.110:

"1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.

2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by air contaminants emitted by the applicant.

3. Variances shall be granted for such period of time and under such terms and conditions as shall be specified by the commission in its order. The variance may be extended by affirmative action of the commission.

4. Any person seeking a variance shall do so by filing a petition for variance with the executive secretary. The executive secretary shall promptly investigate the petition and make a recommendation to the commission as to the disposition thereof. Upon receiving the recommendation of the executive secretary, if the recommendation is against the granting of a variance, a hearing shall be held if requested as provided in section 203.100. If the recommendation of the executive secretary is for the granting of a variance, the commission may do so without a hearing; except, that upon the petition of any person aggrieved by the granting of the variance, a hearing shall be held as provided in section 203.100. In any hearing under this section, however, the burden of proof shall be on the person petitioning for a variance.

5. Upon failure to comply with the terms and conditions of any variance as specified by the commission, the variance may

(Continued on following page)

In addition to the general concern of the State of Missouri that variance procedures be upheld under the Clean Air Act, and that those persons who hold variances from the Missouri Air Conservation Commission not be faced with enforcement action because they have in good faith relied on the variances granted them, Missouri has another interest in the instant case. There is presently pending in the United States Court of Appeals for the Eighth Circuit a petition by the Union Electric Company, the major supplier of electric power for the St. Louis area, for review of the sulfur dioxide regulations of the Missouri implementation plan.[3] The State of Missouri has intervened in the Union Electric case, and has presented the Court of Appeals with the suggestion that since the Missouri Air Conservation Commission has not passed on Union Electric's applications for variances from the sulfur dioxide regulations, the petition should be dismissed, or held in abeyance, until the state has the opportunity to do so.[4] If this Court were to affirm the decision of the Court of Appeals below, Missouri would of course be foreclosed from making this contention.

Footnote Continued—

be revoked or modified by the commission after a hearing held upon not less than thirty days' written notice. The notice shall be served upon all persons who will be subjected to greater restrictions if the variance is revoked or modified, or who have filed with the executive secretary a written request for notification."

3. *Union Electric Co.* v. *Environmental Protection Agency*, No. 74-1614, 8th Cir., petition filed August 19, 1974. Oral argument on the question of jurisdiction will be heard on January 10, 1975.

4. This position is based on language in *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), which indicates that the Courts of Appeals may not review a state regulation if the state has not yet passed on a variance request.

ARGUMENT

Congress Did Not Intend to Foreclose the States from Granting Variances from Their Respective Implementation Plans Where Such Variances Would Not Interfere with the Attainment and Maintenance of National Ambient Air Quality Standards.

The basic question before this Court is whether the Clean Air Act leaves room for the states to grant certain types of variances from their respective implementation plans. Counsel for the State of Missouri trusts that the parties to this case will present the relevant case law and statutory citations, and, therefore, Missouri has no need to present a lengthy brief on the subject. However, Missouri is concerned that the opinion of the Court of Appeals for the Ninth Circuit be presented to the Court as the correct construction of the Clean Air Act.

That opinion, *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-2145 (9th Cir., Nov. 11, 1974), held that minor variances (those variances which will not interfere with the attainment and maintenance of national ambient air quality standards) could be granted even beyond the date specified by 42 U.S.C. §1857c-5(a)(2)(A)(i). This opinion goes beyond the positions taken by the First, Second and Eighth Circuits,[5] and beyond the postition now taken by EPA.[6] Missouri submits that the proper construction of the Clean Air Act would allow minor variances (those variances not interfering with attainment and maintenance of national standards) both before and after the mandatory attainment date, and that the decision whether to grant such variances is left by the Act to the respective states.

5. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974).

6. 40 C.F.R. §§51.11(g), 51.15(d), 51.32(f). Prior to the 1st Cir. Opinion, EPA had taken the position that variances which did not interfere with the attainment and maintenance of national standards would be permitted as revisions of the implementation plan during both the pre-attainment and post-attainment periods. 40 C.F.R. §§51.6, 51.32(f).

It is the position of the State of Missouri that 42 U.S.C. §1857c-5(f) was not intended by Congress to be the exclusive means of granting relief from a particular requirement of an implementation plan, where a source of emissions cannot comply with the plan because of technological infeasibility. This position is based on the proposition that the attainment and maintenance of national ambient air quality standards, and not emission limitation, is the basic goal of the Act, and that under the Clean Air Act, as amended, the primary responsibility for attainment and maintenance of the national standards still resides in the states. These propositions are adequately supported by a reading of the Clean Air Act as a whole, rather than narrowing the inquiry to an analysis of the specific language of 42 U.S.C. §1857c-5(f) alone. The United States has thoroughly covered these points in its brief, and Missouri will not burden the Court with a repetition of these arguments. Instead, Missouri will argue that the rationale of the Ninth Circuit should be adopted by this Court.

As discussed above, the Ninth Circuit has held that the Clean Air Act does not prohibit the states from granting variances from particular requirements of implementation plans, where such variances will not interfere with the attainment and maintenance of ambient air quality standards. The State of Missouri believes that the Ninth Circuit position is the only logical one to take when the practical effects of the other positions are considered.

The effects of the other positions before the Court can readily be seen from the following situation. A large electric utility, supplying 99 percent of the electric power to a metropolitan area of 1.8 million people, is in violation of specific emission limitations (set by state regulations) at the mandatory attainment date. However, the national ambient air quality standards for that pollutant are not being exceeded for the metropolitan area. The utility finds that it is unable to apply those emission control techniques required to bring its emissions of the particular pollutant within state regulation limitations, because the technology for such controls has not been developed, or because shortages of fuels and/or control equipment make compliance with the state emission limitation impossible at the present time.[7]

Faced with this situation, the utility has a choice. Under the positions taken by the United States and Natural Resources Defense Council, Inc., it can either continue to operate in violation of the emission limitation and face large fines for such violations, or it can shut down its operations, thereby causing a substantial, even massive disruption of the regional economy and a threat to the public welfare. We submit that Congress did not intend such a result and that the Clean Air Act cannot be read to mandate such a result.

Accepting the proposition that the regulatory scheme of the Act is designed to force the development of new air

7. Although at the moment hypothetical, we believe that this set of facts could exist in Missouri on June 1, 1975, with respect to sulfur dioxide emission limitations. The hypothetical assumes that the one-year postponement provided in 42 U.S.C. §1857c-5(f) was not taken advantage of. The same situation could well exist on June 1, 1976, after the one-year postponement had expired, even if the postponement were applied for and granted.

pollution control technology, Congress could not have intended that substantial economic disruption should occur, where the national ambient air quality standards are being met and maintained, simply to achieve an emission limitation which was ambitiously set at a level more stringent than necessary. The national ambient air quality standards, by definition, are set at a level which will protect the public health and welfare.[8] If the public health and welfare are being adequately protected in an air control region, then it is illogical to enforce a more stringent emission limitation against a source which cannot comply with it,[9] especially when economic disruption detrimental to the public welfare will result.

Under the construction of the Clean Air Act, advanced by the parties to the case at bar, there is almost no flexibility in the Act to meet the exigencies of a situation where technology has not advanced as rapidly as anticipated in 1970. With the mandatory attainment date fast approaching,[10] there are still technological hurdles to be crossed in order to effectively control certain pollutants such as the

8. 42 U.S.C. §1857c-4(b).

9. To some extent we are also talking about a situation where compliance with an emission limitation more stringent than necessary to meet national standards is technologically feasible, but economically infeasible. In some situations the cost of compliance could reach a point where it would have an economic impact outweighing the benefit to the public from extra increments of emission reduction. In such cases, we submit that the states should have the authority and responsibility to strike the balance between costs and benefits.

10. The mandatory attainment date for national primary ambient air quality standards in most states is May 31, 1975. 40 C.F.R. Part 52. In addition, a number of states must also meet secondary standards by that date. 40 C.F.R. Part 52.

photochemical oxidants.[11] And clean fuels are in shorter supply than anticipated in 1970. There seems to be little chance that some of the technological and resource supply problems will be resolved by mid-1975, or even mid-1976. Yet the positions of the First, Second and Eighth Circuits are that no later than mid-1976 (for most states) all sources must comply with emission limitations, even if national standards have been met and are being maintained. The position of the Fifth Circuit is, of course, even more restrictive.

Missouri submits that with regard to the issue before the court, the only logical construction of the Clean Air Act is that placed on it by the Ninth Circuit. That is, that 42 U.S.C. §1857c-5(f) is not the exclusive means of achieving flexibility in enforcement of state implementation plans. Instead, a state may grant a minor variance (one which does not interfere with the attainment and maintenance of national standards) even after the mandatory attainment date. Any other construction of the Act will result in absurd consequences,[12] and Congress cannot be presumed to have intended such absurdities.

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11. In addition, there is a great dispute between the EPA and the electric power industry as to whether the technology for controlling sulfur dioxide emissions is presently available. Furthermore, assuming EPA's position is correct that the technology for controlling sulfur dioxide emissions is now presently available, common sense dictates that all power plants in the United States cannot be brought into compliance by mid-1976, simply because it is physically impossible to complete such a massive construction program by mid-1976. Therefore, no matter what it is called, variances will have to be granted from such mandatory dates.

12. Major industrial and utility facilities closing down or paying large fines, even though the public health and welfare is being protected (because national ambient air quality standards are being met) and compliance within an emission limitation is impossible or economically ruinous, is, we submit, absurd.

Admittedly, all sources must comply with the national ambient air quality standards on the mandatory attainment date (unless a one-year postponement is granted pursuant to 42 U.S.C. §1857c-5(f)). Yet there is no statutory language which would suggest that minor variances be treated any differently after the attainment date than before such date In fact the Act, in implicitly encouraging the states to adopt implementation plans more stringent than necessary to achieve and maintain the national standards,[13] would seem to require post-attainment flexibility. And it has been postulated that 42 U.S.C. §1857c-5(f) itself requires a uniform approach to pre-attainment and post-attainment variances.[14] We see no basis in the Act for a different treatment of pre-attainment and post-attainment variances.

An alternative to the granting of minor variances in cases of technological or economic infeasibility is, of course, a relaxation (lowering) of emission limitations to the bare minimum.[15] The difficulty with this approach is that it lowers air pollution control for all sources to the lowest common denominator. This approach flies in the face of reason and the provisions of 42 U.S.C. §1857d-1.[16]

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13. 42 U.S.C. §1857d-1; Comment, *Variance Procedures Under The Clean Air Act: The Need For Flexibility*, 15 Wm. and M. L. Rev. 324, 336-337 (1973).

14. *Id.*; see also *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra*, Slip Opinion pp. 7-8.

15. EPA has suggested (at least implicitly) this approach in certain informal publications.

16. Footnote 13, *supra*; 42 U.S.C. §1857d-1 provides:

"Except as otherwise provided in sections 1857f-6a, 1857f-6c(c)(4), and 1857f-11 of this title (preempting certain State regulation of moving sources) nothing in this chapter

(Continued on following page)

Does it not make more sense to set emission limitations at levels which make an effort to improve ambient air quality, and make judicious use of minor variances to accomodate cases where the stringent limitations cannot be met for a period of time, than to require all sources to meet only the minimum levels of emission reduction necessary to protect the public health and welfare?

We submit that 42 U.S.C. §1857d-1 provides, at the least, that the respective states have the option to enact such a scheme of regulation. Otherwise, Congress would have had no reason to specifically provide in that section for state regulation and enforcement of emission limitations in the terms there provided. Congress could not have intended to enact a regulatory scheme encouraging innovation and progressive regulation, yet prohibit any flexibility after the scheme takes final effect.

It might also be suggested that the flexibility required to meet technological and economic reality could be provided by a judicious delay of enforcement, or the use of schedules of compliance in enforcement orders, by EPA.[17]

Footnote Continued—

> shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if emission standard or limitation is in effect under an applicable implementation plan or under section 1857c-6 or section 1857c-7 of title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

17. EPA has suggested the use of such a scheme in its publication "National Strategy For Control of Sulfur Oxides From Electric Power Plants", pp. 16-17, 23-24 (Washington, D.C., July 1974).

This would amount, in effect, to EPA's granting of variances to individual sources. We feel, however, that this scheme is less desirable than state variance procedures, because state variances are granted after public hearing. EPA, on the other hand, need not hold a hearing, or otherwise subject a proposed enforcement order to public scrutiny. In addition, state variances can be granted only for certain specified reasons,[18] while EPA's standards of granting compliance delays are known only to them. We submit that state variance procedures, with approval of the variance by EPA,[19] is a more equitable procedure, less susceptible to abuse, and is a procedure contemplated by Congress when it enacted the Clean Air Act.

CONCLUSION

Amicus Curiae, the State of Missouri, submits that 42 U.S.C. §1857c-5(f) is not the exclusive method whereby compliance with particular requirements of a state implementation plan may be deferred if national ambient air quality standards are being met and maintained. Rather, the Clean Air Act allows the states to grant minor variances, subject to EPA approval, both before and after the mandatory attainment dates provided in 42 U.S.C. §1857c-5(a)(2)(A). Any other reading of the Clean Air Act would plainly defeat the intent of Congress to encourage the states to set emission limitations and compliance dates more stringent than required to meet national ambient air

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18. See Appendix p. 1.

19. Variances are presently treated as revisions of the state implementation plan, 40 C.F.R. §51.6.

quality standards, and would result in inequitable, absurd and economically disastrous consequences.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General

WALTER W. NOWOTNY, JR.
Assistant Attorney General

DAN SUMMERS
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314/751-3321)

Attorneys for Amicus Curiae

Natural Resources Defense Council, Inc.

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January 16, 1975

RECEIVED
JAN 17 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. Michael Rodak, Jr., Clerk
United States Supreme Court
One First Street, N.E.
Washington, D. C. 20543

Re: Russell E. Train, Administrator, United States Environmental Protection Agency, and United States Environmental Protection Agency ("EPA"), v. Natural Resources Defense Council, Inc., Save America's Vital Environment, Janey Weber, and Suzanne Allstrom, ("NRDC, et al."), No. 73-1742

Dear Mr. Rodak:

Yesterday, in oral argument on the above-referenced case, I was questioned by the Court with respect to the question of respondents' standing to bring suit in the court below. Having consulted my records, I find that my memory of the history of this issue before the lower court was in error in some respects. In order to allow the Court to consider the issues discussed yesterday on the basis of accurate information, I would appreciate your conveying this letter and the attached documents to the Justices.

As I stated at oral argument, the issue of the standing of respondents (petitioners below) was considered by the Fifth Circuit. This case arose pursuant to a provision of the Clean Air Amendments, § 307, 42 U.S.C., § 1857h-5, which provides for direct review of certain of the EPA Administrator's decisions in the United States Court of Appeals. NRDC, et al., originally filed a simple notice pleading in the form suggested in Rule 15(a) and Form 3, F.R.A.P., for seeking review of an administrative action. This petition was filed by the Fifth Circuit clerk's office on May 30, 1972. (The petition, together with the Clerk's notice of filing, are appended to this letter as Attachment A.)*

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* Inexplicably, none of the attached documents were transmitted to this Court with the record in the court below. Since respondents herein were the prevailing parties in the court below, and therefore were not responsible for the transmission of the record, this was unknown to me prior to Wednesday's argument.

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During the period prior to the challenged approval of the Georgia Plan, while EPA was considering whether to approve the State Implementation Plans for all the States, petitioner NRDC had submitted extensive comments. These comments addressed the variance issue now before the Court, and noted, inter alia, the fact that Georgia's variance statute was among those NRDC considered deficient. Because of this participation in the administrative process leading up to the challenged agency action, because there seemed no question that petitioners met the requirements for standing, and because of the Federal Rules' instruction as to the proper form for filing a petition for review, petitioners did not allege facts with respect to standing in their petition.

This appears to have been the government's understanding also, for EPA did not, contrary to my recollection yesterday before the Court, challenge petitioners' standing at any time during the proceedings.

In December, 1973, however, the County of Harris, Texas, filed with the Fifth Circuit a motion to submit a brief amicus curiae, which was granted by the court. In its brief, Harris County raised the issue of petitioners' standing to bring suit.

In order to resolve any questions with respect to their standing, NRDC, et al., filed on January 23, 1974, a motion to amend their petition to allege facts in support of their standing, together with an amendment to the petition. A copy of this motion is appended as Attachment B to this letter; the amendment to the petition is appended as Attachment C.) The motion to amend was granted by the court on February 7, 1974.*

As amended, the petition recites that NRDC is a non-profit, national membership organization, dedicated to the protection of the environment, with some 16,000 members nationally, and states that in the instant case NRDC is suing on behalf of the interests of the 103 of its members who reside in Georgia in the protection of their personal health and welfare. In an affidavit appended to this allegation (Exhibit 1, pp. 3-4, of Attachment C hereto) the amended petition notes that during the period while EPA was considering the State Implementation Plans in 1972,

> NRDC submitted a lengthy and detailed analysis of some 24 of these Plans, pointing out the

---

* Petitioners did not receive a copy of the court's order granting their motion to amend. However, a call to the clerk's office at the Fifth Circuit Court of Appeals today confirmed that the motion to amend was granted on February 7, 1974. The clerk's office has agreed to forward a copy of the court's order to Mr. Rodak as soon as possible.

> weaknesses which we felt required disapproval of them, at least in part. Some of [NRDC's] criticisms were heeded in EPA's subsequent rule-making with respect to the Plans (37 Fed. Reg. 10842 (May 31, 1972)) [the rule-making at issue in the case now before the Supreme Court]; others became the subject of litigation.

The amended petition also alleges that Save America's Vital Environment ("SAVE") is a non-profit corporation, organized under the laws of Georgia, whose 200 members who reside in Georgia have affiliated for the purpose of protecting their interests in the environment of Georgia from encroachment or destruction. The petition states that in this case, SAVE represents its members' personal interest in the protection of their health and welfare, which would be injured if the Administrator's approval of the deficient Georgia Implementation Plan were allowed to stand.

With respect to the two individual petitioners, Suzanne Allstrom and Janey Weber, the amended petition states that Miss Allstrom lives in a central city neighborhood of Atlanta, Georgia, surrounded by commercial and industrial development, and that Miss Weber also resides in the polluted Atlanta Air Quality Control Region. It states that both women sue on behalf of their interests in eliminating the injury to their personal health and welfare caused by the polluted Atlanta air.

I have transmitted the attached documents to you, after consultation with Mr. Norton, of the Solicitor General's office, in an attempt to comply as rapidly as possible with yesterday's request from the bench to make available to the Court the materials from the court below related to the standing issue. I believe that, as amended, the pleadings before the court below clearly establish the standing of NRDC, et al., under the Clean Air Amendments and the prior decisions of this Court. The Court has previously taken note of the fact that polluted air is a societal ill that injures very wide segments of the population. U.S. v. S.C.R.A.P., 412 U.S. 669 (1974).

Mr. Norton and I wish to express our appreciation for your help in bringing this clarifying information before the Court. Should the Court wish to explore the standing question further, both parties would request an opportunity to address briefs to the issue.

Sincerely yours,

Richard E. Ayres

Richard E. Ayres
Counsel to Respondents

Enclosures
cc: Gerald Norton

ATTACHMENT A:

Petition for Review and

Notification of the Filing of the Petition for Review from the Office of the Clerk, United States Court of Appeals for the Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Natural Resources Defense Council, Inc., Project on Clean Air Save America's Vital Environment, Inc. Janey Weber Susanne Allstrom Petitioners, against Environmental Protection Agency Respondent	)	No. _____

PETITION FOR REVIEW

Petitioners petition this court for a review of the rules and regulations promulgated by respondent (37 Fed. Reg. 10842 et seq., 40 CFR Part 52, Subchapter C) insofar as they approve the State implementation plan for the State of Georgia.

Ogden Doremus
111 West Congress St.
Savannah, Ga. 31402
Tel. 914-234-7215

Richard E. Ayres
36 West 44th Street
New York, New York 10036
Tel. 212-986-8310

Counsel for Petitioners

NRDC v. EPA (Georgia)

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130
(504) 527-6514

June 30, 1972

Mr. William D. Ruckelshaus
Administrator
Environmental Protection Agency
Waterside Mall
4th and M Streets, S.W.
Washington, D.C. 20460

Re: No. 72-2402 NATURAL RESOURCES DEFENSE COUNCIL, INC., PROJECT ON CLEAN AIR, ET AL -vs- ENVIRONMENTAL PROTECTION AGENCY

Dear Sir:

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, you are herewith being served with the following document this day filed:

(x) Petition for Review.

( ) Application for Enforcement.

( ) Cross-Application for Enforcement.

See Rules 16 and 17 of the Appellate Rules as to the composition and time for the filing of the record.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By Marie Centanni
Deputy Clerk

/mgc
enc.
cc: Mr. Richard E. Ayres
Mr. Ogden Doremus, III
Hon. Jimmy Carter

FPI 81—7-15-68-88-2408

ATTACHMENT B:

Motion of NRDC, et al., to Amend the Pleadings to Allege Facts Supporting Petitioners' Standing to Sue

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Petitioners,	)	
v.	)	No. 72-2402
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

MOTION TO AMEND THE PLEADING TO ALLEGE
FACTS SUPPORTING PETITIONERS' STANDING TO SUE.

Purpose of Motion

Petitioners hereby move the Court to amend the pleadings in this case to allege facts in support of their standing to bring suit. This motion in no respect implies agreement with amicus[1] Harris County that such an allegation is necessary; to the contrary, the county's request has basis in neither law nor policy, as we will show in a Memorandum of Law to be submitted shortly to the Court. Rather, the motion is intended merely to assure the Court that petitioners are proper parties to bring this suit, and to protect petitioners' interests.

1/ This motion has not been submitted previously because counsel for petitioners has not received any Court ruling granting Harris County the right to submit a brief amicus curiae in this proceeding. Notice that such intervention has been granted reached petitioners' counsel only recently, through a letter from the Harris County District Attorney's office. According to that letter, the Court granted Harris County's motion to intervene in December.

Leave to Amend
Should be Granted

Section 1653 of the Judiciary Code, 28 U.S.C. §1653, provides that "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." Long-standing case law, and the Federal Rules of Civil Procedure, establish that this mandate is to be read broadly, to prevent doing injustice and to assure that substantive rights are not extinguished on procedural grounds.

The principle that courts should freely allow amendments of pleadings to prevent doing substantive injustice is threaded through a long-standing and powerful body of law. Long before the passage of the liberalized Federal Rules, the Supreme Court held in two cases that plaintiffs should be allowed to cure defects in their pleadings, rather than suffer dismissal. In Howard v. DeCordova, 177 U.S. 609 (1900), the Court declared it to be the duty of the lower court to allow a plaintiff to amend his complaint to allege proper citizenship for purposes of diversity jurisdiction. Thirteen years later, the Court added, in Springstead v. Crawfordsville State Bank, 231 U.S. 541 (1913), that where a plaintiff had averred diversity, he must be allowed to amend his complaint to allege the facts needed to prove the averral.

Countless succeeding cases at the district and appellate court levels reiterate the same principle. These decisions span the gamut of grounds for federal jurisdiction, allowing amendment

to allege diversity,[2] amount in controversy,[3] place of business,[4] citizenship,[5] residence,[6] alternative grounds for jurisdiction,[7] and federal question.[8]

The principle of freely allowing amendment of pleadings is so thoroughly ingrained in the law that it applies even after judgment has been rendered. For example, Professor Moore states that one of the two reasons for granting a Motion to Alter or Amend a Judgment should be to vacate a judgment of dismissal in

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2/ Troupe v. Chicago D.&G. Bay Transit Co., 234 F.2d 253 (2d Cir., 1956); McEldowney v. Card, et al., 193 F. 475 (C.C. Tenn., 1911); Atchison, T.&S.F. Ry. Co. v. Gilliland, 193 F. 608 (9th Cir., 1912); Stockwell v. Boston and M. Ry. Co., 131 F.R. 153 (Vt., 1904); Cleveland Cliffs Iron Co. v. Village of Kinney, et al., (D.C. Minn., 5th Div., 1919).

3/ Williams v. Molther, et al., 198 F. 460 (2d Cir., 1912); Lemmon v. Cedar Point, Inc., 496 F.2d 94 (6th Cir., 1969); Carr v. Fife, 45 F. 209 (C.C. Wash., 1891), aff'd, 156 U.S. 494 (1895); Cox v. Livingston, 407 F.2d 392 (2d Cir., 1969).

4/ Velandra v. Regie, 336 F.2d 292 (6th Cir., 1964).

5/ Cunard S.S. Co., Ltd. v. Sullivan, 6 F.2d 383 (2d Cir., 1925); Kaufman v. Western Union Telegraph Co., 224 F.2d 723 (5th Cir., 1955); Smith v. Dealers' Transit, Inc., 239 F. Supp. 605 (E.D. Tenn., 1965).

6/ Troupe v. Chicago, D.&.G. Bay Transit Co., 234 F.2d 253 (2d Cir., 1956).

7/ Martin v. Ethyl Corp., 341 F.2d 1 (5th Cir., 1969).

8/ Blanchard v. Terry and Wright, Inc., 218 F.Supp. 910 (D.C.W.D. Ky., 1963), aff'd 331 F.2d 467 (6th Cir., 1964), cert. denied, 379 U.S. 831 (1964).

order to allow the amendment of a complaint. 6A Moore's Federal Practice, ¶59.12. Professor Moore cites numerous cases for the proposition that a trial court would abuse its discretion if it denied leave to amend, even after dismissing a case.[9] Where, as here, the case is still pending, the rule applies with even greater force.

On the basis of these authcrities, the motion to amend should be granted.

Respectfully submitted,

Richard E. Ayres

Richard E. Ayres
Counsel to Petitioners

January 23, 1974

9/ Though this is not a trial court, the situation is analogous, since the Court of Appeals is the court of first instance in this case.

CERTIFICATE OF SERVICE

I certify that copies of petitioners' Motion to Amend the Pleadings to Allege Facts Supporting Petitioners' Standing to Sue and Amendment to Petition for Review Herein were served to Henry J. Bourguignon, Esq., Appellate Section, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530 and Charles J. Wilson, Esq., Assistant County Attorney, 301 San Jacinto Street, Suite 202, Houston, Texas by placing them in the U.S. Mail, properly addressed and postage prepaid this 23rd day of January, 1974.

Richard E. Ayres

Richard E. Ayres
Counsel to Petitioners

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ATTACHMENT C:

Amendment of NRDC, et al., to their Petition for Review

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,	)	
Petitioners,	)	
v.	)	No. 72-2402
ENVIRONMENTAL PROTECTION AGENCY	)	
Respondent.	)	

AMENDMENT TO PETITION FOR REVIEW HEREIN

On June 30, 1972, petitioners herein filed a petition for review of the rules and regulations promulgated by respondent Environmental Protection Agency ("EPA") (37 Fed. Reg. 10842, et seq., 40 CFR Part 52, Subchapter C) insofar as they approved the State Implementation Plan, submitted pursuant to the Clean Air Amendments of 1970, of the State of Georgia. In support of their standing to sue in such matter, petitioners hereby amend this petition by inserting, at the end of the paragraph stating the issue for which review is sought, the following allegation of facts.

Standing

1. Petitioner NATURAL RESOURCES DEFENSE COUNCIL, INC. ("NRDC"), is a non-profit corporation organized under the laws of the State of New York, with offices at 15 West 44th Street, New York, New York, 1710 N Street, N.W., Washington, D.C., and 664 Hamilton Avenue, Palo Alto, California. NRDC is a national organization dedicated to the preservation and defense of the human environment and natural resources of the United States. Among NRDC's objectives are: (a) to provide a central, national focus for lawyers, scientists, and concerned citizens in an effort to make our courts and administrative agencies effective instruments of environmental protection; (b) to undertake environmental cases which have a potential for establishing widely applicable precedent or for saving or reclaiming an important aspect of our national endowment; (c) to provide legal advice and assistance to citizens and organizations seeking to protect the environment; (d) to monitor federal and State administrative agencies to ensure that the fullest consideration of the public interest in protecting the environment; and (e) to create and foster wide public understanding of how resources may be saved and reclaimed through the law.

Since early 1971, one of NRDC's major projects has been monitoring the implementation of the 1970 Clean Air Act. NRDC's considerable efforts to this end are documented in the attached affidavit (See Exhibit 1, attached) and the value of NRDC's interests in monitoring State and federal actions with regard to air pollution were explicitly noted by Judge Frankel in the decision of the District Court in Harlem Valley Transportation Association, et al., v. George M. Stafford, et al., 5 ERC 1503 (D.C.S.D.N.Y., June 21, 1973). See Exhibit 2, 5 ERC at 1507 (attached).

In the instant case, NRDC represents the 103 of its approximately 16,000 members who reside in Georgia. The health and welfare of these members as well as NRDC's long term interests in the diligent implementation of the Clean Air Act are adversely

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affected by EPA's approval of the Georgia State Plan which does not insure the attainment of the National Standards as required by the Clean Air Act.

2. Petitioner SAVE AMERICA'S VITAL ENVIRONMENT ("SAVE") is a non-profit corporation, organized under the laws of Georgia in 1969. With a membership of some 200 Georgia residents, it maintains its principle office at 881 W. Conway Road, N.W., Atlanta. SAVE's purpose is to protect the environment of Georgia from encroachment and destruction through legislative, judicial, and administrative processes, as well as through citizen education. The organization maintains four full-time representatives at the Georgia State Capitol to advise State legislators on its members' interests in protecting Georgia's natural resources.

SAVE has represented the interests of its members in protecting public health and welfare from the dangers of air pollution over a long period of time. During 1972, SAVE testified in the State hearings held pursuant to §110 of the Clean Air Amendments on the Georgia State Implementation Plan, which is the subject of this litigation. SAVE also has sponsored, over the past three years, several public information forums on clean air and transportation control issues.

The knowledge and concern of SAVE members has been recognized by appointments to serve on Georgia State environmental agencies dealing with air pollution problems. The current SAVE President, Robert Humphries, was chosen to serve on the Georgia Ad Hoc Committee on Air Quality Standards, as well as the Citizens' Advisory Committee to the Georgia Department of Health at the time when the Department had full responsibility for the control

of air pollution. Two members of the SAVE Board of Directors currently serve as members of the Board of Georgia State Department of Natural Resources, the agency now responsible for air pollution matters.

As petitioner in this case, SAVE therefore represents its members' interests in two ways. First, SAVE represents its members' direct, personal interest in the protection of their own health and welfare, which will be irreparably injured should the Administrator's illegal approval of the Georgia Plan be allowed to stand. Second, SAVE represents its members' interest in preserving and extending the protection of public health and welfare of all the citizens of Georgia which they have labored so long and responsibly for.

3. Petitioner SUSANNE ALLSTROM resides at 819 Ashland Avenue, N.E., Atlanta, Georgia, in a central city neighborhood, Inman Park, surrounded by industrial and commercial development. As a member and former officer of the Inman Park Association, a neighborhood membership organization with over 200 members, Ms. Allstrom has concerned herself in the last three years with numerous environmental issues related to air pollution, ranging from support for a "City Park Plan" and opposition to proposed I-485 highway construction to formal complaints about emissions of noxious gas and soot from a local foundry. These complaints culminated in a suit brought by the Fulton County Health Department against the Grinnell Corporation.

The Administrator's approval of a State Implementation Plan for Georgia that fails to insure the attainment and maintenance of National Air Quality Standards in the polluted Atlanta Air

Quality Control Region directly and adversely affects Ms. Allstrom's interests in protecting her health and welfare from the continuing damage caused by the pollution in her neighborhood and city.

4. Petitioner JANEY WEBER, 670 Starlight Lane, N.E., Atlanta, Georgia, also resides in the polluted Atlanta Air Quality Control Region. As a result, her health and welfare are subjected to the continuing insults caused by air pollution. The Administrator's approval of the deficient State Implementation Plan therefore also directly and adversely affects Ms. Weber's interests in her health and welfare, by failing to insure the attainment and maintenance of air quality meeting the National Standards.

EXHIBIT 1

AFFIDAVIT RELATED TO INTERESTS OF PETITIONER
NATURAL RESOURCES DEFENSE COUNCIL, INC.
IN THE ADMINISTRATION OF THE CLEAN AIR ACT
IN THE CASE OF THE
HARLEM VALLEY TRANSPORATION ASSOCIATION, ET AL.,
v. GEORGE M. STAFFORD, ET AL.,
73 CIV. NO. 1330 (D.C.S.D.N.Y., JUNE 21, 1973)

(includes Attachments 1, 2, and 3, to the Affidavit originally filed with the Court)

AFFIDAVIT OF RICHARD E. AYRES
STAFF ATTORNEY, NATURAL RESOURCES
DEFENSE COUNCIL, INC.

City of Washington, District of Columbia, SS:

RICHARD E. AYRES, being duly sworn, deposes and says:

I. Background

1. My name is Richard E. Ayres. Since August, 1970, I have been employed as a staff attorney for the Natural Resources Defense Council, Inc. ("NRDC"). Beginning in January, 1971, I organized and have since devoted virtually my entire professional attention to NRDC's Project on Clean Air, a national citizens effort to assure the rapid and effective implementation of the Clean Air Amendments of 1970.

2. The Project has been one of NRDC's major commitments of energy and resources. Since 1971, three full time persons, and numerous part-time paid and volunteer students, have been helping in the preparation of educational materials concerning the provisions of the Clean Air Amendments, in disseminating these materials, and in generally keeping in contact with local groups throughout the country to inform them of new federal regulations and policies affecting the implementation of the Act. In addition, the Project has consumed about three-fourths of the time of a second NRDC attorney since approximately November, 1971, and about one-third of the time of a third NRDC attorney so far in 1973. To date, NRDC has expended approximately $100,000 in staff time and other expenses in its effort to insure strong administration of the Act.

II. Activities

The Project's activities span the gamut from education through litigation, and include extensive participation in federal and State rule-making proceedings, testimony, on invitation, before legislative bodies, and public speaking engagements.

1. One of the primary purposes of the Project has been to educate the public to the far reaching ramifications of the Clean Air Amendments, and to the specific legal rights and opportunities it gives for citizen action to assure that the intent of the Act is met. In September, 1971, the Project published a widely acclaimed citizens Manual, "Action for Clean Air" [Attachment 1], explaining in the provisions of the Clean Air Amendments and how citizens could use them to obtain the best possible State Implementation Plans (required by Section 110 of the Act, 42 U.S.C. §1857c-5). Nearly 5,000 copies of this Manual were distributed throughout the country, to citizens, citizens' groups, and State and federal governments. The federal Environmental Protection Agency itself ordered more than 700 copies of the Manual.

In January, 1973, NRDC published a second manual, "Transportation Controls for Clean Air." [Attachment 2]. This Manual provided information for citizens on the Amendments' requirement for transportation control programs as a means to attain the National Air Quality Standards mandated by the Act. About 3,000 copies of the Manual have been distributed, some 500 of them to federal air pollution officials.

In addition to its manuals, the Project has published, in the NRDC Newsletter, an analysis of the unique citizens' suit provision of the Clean Air Amendments, Section 304, 42 U.S.C. §1857 . [Attachment 3].

To help reach relevant citizens with its informational materials, NRDC has established an extensive network of contacts with some 400 citizens groups across the country. Besides its Manuals and Newsletter, NRDC makes irregular mailings to bring citizens up to date on new developments at the federal level that affect their local air pollution programs.

Project personnel and NRDC staff attorneys have been widely sought after to represent environmental interests in speeches before conferences and citizens gatherings. During the Fall of 1971, I traveled to Minnesota, Louisiana, Indiana and Kentucky to address citizen conferences called to consider proposed State Implementation Plans, and addressed the Environmental Section of the American Society of Mechanical Engineers on the Clean Air Amendments. David Hawkins, another NRDC clean air attorney, has addressed the Air Pollution Control Association Government Affairs Seminar on the Clean Air Act, the First National Conference on Automotive Air Pollution Control, and the New England Consortium on Environmental Protection.

2. NRDC has participated extensively in the administrative process implementing the Clean Air Amendments, at both federal and State levels. NRDC has submitted formal "comments" on virtually every important rule-making proceeding undertaken by the Environmental Protection Agency ("EPA") since the Amendments were passed in 1970. [A full list is appended at Attachment 4.]

The Project has also participated extensively in the special administrative proceedings, some of them concerning the transportation controls required by Section 110(a)(2)(B) of the Act (42 U.S.C. §1857c-5(a)(2)(B)), called for by the Act. The Act requires that "State Implementation Plans" be submitted to EPA, and that EPA shall disapprove them if they do not meet detailed requirements spelled out in the law. Section 110(c) and 110(a)(2), 42 U.S.C. §1857c-5(c) and §1857c-5(a)(2).

In January, 1972, all 50 States and several territories submitted Implementation Plans for the control of pollution from stationary sources. Shortly thereafter, NRDC submitted a lengthy and detailed analysis of some 24 of these Plans, pointing out weaknesses which we felt required disapproval of them, at least in part. Some of the Project's criticisms were heeded in EPA's

subsequent rule-making with respect to the Plans (37 Fed. Reg. 10842 (May 31, 1972)); others became the subject of litigation (see Point 5 below).

In April, 1973, the States with the most serious problems related to automobile pollution submitted Implementation Plans providing for transportation controls. These Plans detailed the measures States would take to curtail emissions from used cars and trucks, and to reduce the total number of vehicle miles travelled in urban centers, in order to control pollution from these sources. Many of these Plans were based heavily on increasing the use of mass transit facilities, while discouraging the use of the private automobile for commuting. In its extensive comments on these Plans, NRDC pointed out repeatedly that the only reliable, effective means to insure the attainment of the National Air Quality Standards was massive expansion and improvement of mass transit facilities. In its commnets on the New York State Transportation Control Plan, NRDC noted particularly the need for expansion, rescusitation, and refurbishment of the New York City region's mass transit facilities [see Attachment 5].

During 1972, the major auto makers sought extension of the deadlines for meeting the stringent emission standards for new cars mandated by the Act. By law, this request became the subject of national public hearings before the Administrator of the EPA. NRDC's David Hawkins participated heavily in these hearings, testifying against the requested extension, which was denied. When the request was renewed in 1973, Mr. Hawkins once again testified before Mr. Ruckelshaus, though this time the extension was granted.

3. The Project has participated extensively in State proceedings pursuant to the Clean Air Amendments as well.

During 1971 and early 1972, NRDC attorneys and other staff testified on the proposed State Implementation Plans for the States of New York and Connecticut, and for the National Capital Region, and submitted comments to State agencies on proposed Implementation Plans for a number of other States. Detailed analyses of State Plans for stationary sources were submitted to a large number of citizens' organizations, to aid them in the preparation of their own presentations in State hearings on the proposed Plans. In 1973, similar work was undertaken with respect to State Plans for the control of pollution from motor vehicles. Two members of the Project staff testified before New York State authorities on the State Transportation Control Plan for New York [testimony appended as Attachment 6].

4. NRDC attorneys and staff members have also testified extensively, by written invitation, in Senate "oversight" hearings designed to oversee EPA's implementation of the Clean Air Amendments. Richard Ayres testified at length before the Senate Subcommittee on Air and Water Pollution, authors of the Act, on February 16, 1972. Later, David Hawkins testified in the same series of hearings with respect to EPA's implementation of Title II of the Act, regarding motor vehicle emissions. Hearings before the U.S. Senate Subcomm. on Air and Water Pollution, Comm. on Public Works, "Implementation of the Clean Air Amendments of 1970," 92nd Cong., 2d Sess. (1972).

In 1973, Mr. Hawkins testified again before the Senate Subcommittee on Air and Water Pollution, this time with respect to the inadequacy of EPA's budget requests to carry out the program of the Clean Air Amendments. This testimony

has not yet been published.

5. NRDC's Project on Clean Air, in conjunction with a large number of citizens and citizens' groups throughout the country, has also engaged in important litigation testing EPA's interpretation of the Act with respect to both motor vehicles and stationary sources. [A full list of these cases is appended as Attachment 7.] In bringing these cases, NRDC joined local air pollution groups and private citizens across the country in seeking more rapid and effective administration of the Clean Air Amendments. [A list of the groups and individuals who were co-petitioners in these cases is appended as Attachment 8.]

A number of these cases are of particular interest here because they dealt with the relationship between clean air and the use of private automobiles and mass transportation.

In 1971, NRDC brought suit against the Administrator to protect the statute's requirement that 1975 and 1976 automobiles produce 90 per cent less hydrocarbons and carbon monoxide, and nitrogen oxides, respectively, than those built in 1970. NRDC contended that, by re-evaluating the measurement method for 1970 cars, the Administrator had in effect allowed 1975 and 1976 cars to emit more than twice as much of these pollutants as Congress had intended. The District of Columbia District Court, faced with complex technical judgments, declined to gainsay the Administrator's judgment on this point.

In 1972, in a series of cases titled NRDC, et al., v. EPA, NRDC joined a large number of citizens and air pollution control groups in bringing suit to overturn the Administrator's

Richard E. Ayres

Richard E. Ayres
Staff Attorney
Natural Resources
Defense Council, Inc.

SUBSCRIBED AND SWORN to before me this 12th day of June, 1973.

Notary Public

My commission expires January 31, 1975.

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blanket decision to grant an additional two years to the States for attaining the National Air Quality Standards for automotive-related pollutants wherever they could not attain them without transportation controls. Ruling on some eight of these suits,* the Court of Appeals for the District of Columbia reversed the Administrator's decision. NRDC, et al., v. EPA, -- F.2d --, 4 ERC 1945, 41 U.S.L.W. 2400 (D.C. Ci.., Jan. 31, 1973). Because this decision re-established the statutory requirement to meet National Air Quality Standards by 1975, it has increased dramatically the need to refurbish and expand mass transit facilities in order to comply with the law.

NRDC also brought suit against the Administrator in 1971 to stop EPA from postponing the issuance of regulations phasing most tetraethyl lead out of gasoline in 1974. NRDC v. EPA, Civ. No. 72-2233 (D.C. Cir.). On April 27, 1973, the Court gave EPA 60 days to take final action with respect to these regulations.

As Attachment 7 shows, NRDC has been a petitioner in a large number of cases under the Clean Air Amendments in every federal Circuit, and some federal Districts. In some of these cases, NRDC has been the only petitioner, while in others it has been joined by other co-petitioners. In none of these cases has standing been denied by the Court.

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* Identical suits were brought in all federal Courts of Appeals because of ambiguous language in Section 307 of the Act with respect to jurisdiction; on motion of Petitioners, a number of these were transferred to the D.C. Circuit. After the D.C. Circuit's opinion was published, and the EPA agreed to abide by it, the remainder were voluntarily dismissed.

PREFACE

The Clean Air Amendments of 1970, passed by Congress late last year, provide the most far-reaching legal authority ever enacted to control air pollution. Though not perfect, the 1970 Amendments at last provide us with adequate tools for an effective national campaign against air pollution.

Even the best legislation, however, is only as good as its enforcement. How well the Clean Air Amendments are implemented will depend not only on the performance of local, State and federal agencies, but on the quality and persistence of citizen participation as well. Only by maintaining informed and insistent public pressure can we be certain that the opportunities provided by the new law will be fully exploited.

The Project on Clean Air was begun by the Natural Resources Defense Council to help citizens bring this kind of pressure to bear. To help make citizen participation more informed and effective, the Clean Air Project – with help in technical matters from the Scientists' Institute for Public Information – will distribute detailed information designed to make the provisions of the Clean Air Amendments and their related documents more understandable to laymen and to lawyers whose specialty is not environmental law.

Project activities will parallel the implementation of the Amendments. Early this year the Project filed detailed comments on EPA's proposed regulations setting National Air Quality Standards and Guidelines for State implementation plans. Current projects are designed to help citizens participate in the formation of the State implementation plans that must be submitted to EPA by January 30, 1972. After January, we will distribute information on how citizens can obtain monitoring data and help enforce compliance with the implementation plans.

The Project will continue to monitor and comment on federal compliance with the Clean Air Amendments by EPA and the Administration and keep citizens informed of how developments at this level affect them. We will also refer citizen groups to attorneys in their area who have offered their assistance, give advice in cases undertaken by citizens, and in a few cases, intervene on our own.

This Manual is intended to help citizen activists exert the maximum influence on their State implementation plans this fall. Because the 1970 Amendments and the federal Guidelines are complex, our discussion of them is necessarily complex and does not make easy reading. We felt that the only way to help citizens deal with the many problems these documents will raise was to treat each problem in detail. We encourage you to read the Manual through, but much of it is intended mainly as a reference guide and is arranged so that the parts treating each problem can be referred to quickly.

Part I describes the Sections of the amended Clean Air Act that are of immediate concern to clean air groups. A timetable at the end of this part summarizes important deadlines set by the Act. Part II suggests ways for citizens to influence State implementation plans. Part III discusses the federal Guidelines and treats in detail each element of an implementation plan required by the Act and the federal Guidelines. Part IV describes the exemptions and variances allowed by the Act and Guidelines. Part V describes how and when implementation plans must be approved and legal responses to inadequate plans and unwarranted exemptions. Parts III, IV and V suggest specific actions to be taken in response to the problems they raise. The Appendices contain additional helpful information, including sources of literature and example regulations for implementation plans.

Additions and (we hope few) corrections to the Manual will be made through the fall. If the Manual raises further questions, or if you encounter problems we haven't dealt with, contact us and we will try to find answers.

– Richard Ayres
Julie Copeland
James Miller
September, 1971

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I. INTRODUCTION TO THE LAW

If you are to be effective advocates for clean air in the State procedures for writing an implementation plan, you must know the general outlines of the amended Clean Air Act.[1] The first purpose of this Part is to provide a clear exposition of the Act in laymen's terms.

This Manual is no substitute for legal advice, however. Your efforts will be far more effective if you have an attorney working with you. Our second purpose, then, is to provide an introduction to the Act for attorneys, to allow them to use the Act with a minimum of waste motion.

A. CHANGES FROM THE 1967 CLEAN AIR ACT

By September, 1970, a combination of cumbersome procedures, ineffective enforcement provisions and the unwillingness of the Department of Health, Education and Welfare to fully use its powers had contributed to the failure of the Clean Air Act of 1967 to keep up with the growing air pollution problem.

In response to mounting concern, Congress stepped up the national campaign against air pollution by passing the Clean Air Amendments of 1970. These Amendments transform the 1967 Act into a much stronger and more comprehensive program for pollution abatement. In at least seven important respects, the Amendments fundamentally alter previous policy.

The Clean Air Amendments are primarily the product of Senator Muskie's Subcommittee on Air and Water Pollution of the Senate Public Works Committee. Hearings before the Sub-Committee run to five volumes, and the Committee Report (*Senate Report* 92-1196) to more than 100 pages.[2] Throughout these documents, witnesses and Senators repeatedly expressed their concern over the crisis proportions of the threat to health posed by present levels of air pollution.

The Senate Report states clearly that Congress intends, in the Clean Air Amendments, to rid the country of a major health problem. (See especially pages 1-4, 9-15 of the *Report*). Thus, the Clean Air Amendments are no ordinary legislation—Congress plainly felt it was dealing with an important and pervasive problem, and made it clear that this legislation was not to be treated lightly by federal and State administrators.

This heightened concern was translated into major changes in the requirements governing administrators' actions, and in the distribution of authority for air pollution control.

The 1970 Amendments make significant inroads on the formerly prevailing "air management" concept of pollution control. "Air management" means that the governmental agency responsible for pollution control determines what the "ambient air quality"—the general or average pollution—is in its region, then sets emission controls on individual pollution sources in an attempt to bring its ambient air quality into conformity with a State or federal standard. The drawbacks of this approach are that the ambient air quality for an entire region is difficult to measure accurately, and that it is hard to determine which controls on individual sources will yield the desired air quality.

The new Act partially rejects this concept. Instead, in Sections 111 and 112 it requires the federal government to go directly to the polluting industry, setting uniform national standards for emissions from entire categories of "new sources" of pollution (plants being built or modified) and emitters of "hazardous pollutants" (such as asbestos, beryllium, or mercury). These standards will require each polluter to install the best available control technology, regardless of the air quality in the region where he locates his plant. Since these standards will apply to all plants built or modified in the future, they will gradually come to control air pollution from most sources throughout the country.

The "air management" concept has been retained for State pollution control efforts, but it has been considerably modified by the 1970 Amendments.

Under the 1967 Act, air quality standards were to be set at levels which protected public health, but States were directed to take into account the costs of control. Under the 1970 Act, air quality standards are to be set at levels which will protect public health and welfare, without reference to the costs of attaining them.

[1] The Clean Air Amendments of 1970 amended the Clean Air Act of 1967. In this Manual, except where we specify otherwise, we use "Clean Air Act" to mean the 1967 Act as changed by the 1970 Amendments; "Amendments" means the 1970 Amendments alone.

[2] These documents can be ordered from the sources listed on page 71.

The 1970 Amendments have also considerably broadened the role of the federal government in setting standards for air quality, overseeing State attempts to reach these standards, and enforcing them when the States fail to. Under the new Act, minimum standards of air quality are uniform and national; States may set even stricter standards, but all sections of their territory are subject to the national standards. The federal Environmental Protection Agency (EPA) exercises veto power over State plans designed to meet these standards, and may promulgate its own plan if the State's plan is inadequate. Perhaps most important, the federal government now has the power to enforce State emission controls, and even whole State plans if violations are so widespread that it appears the State has failed to enforce its plan altogether.

One of the strongest themes running through the hearings on the Amendments, the Senate Committee Report, and the Amendments themselves is Congress' endorsement of citizen pollution control efforts. Public hearings are required on States' control plans and on all subsequent revisions. Citizens are guaranteed a role in enforcing these plans by the citizen suit provision, which gives citizens the right to sue in federal court polluters who fail to comply with State emission control regulations.

The Amendments have also corrected one of the most galling weaknesses in the 1967 Act by setting specific timetables for compliance. The Amendments require both that States develop and carry out plans by certain times, and that these plans set definite timetables for each polluter to comply with the plans' requirements.

Finally, the Act adds a specific requirement that States go beyond merely controlling emissions from the smokestacks of polluters and use such measures as land use and traffic controls and control of the sulfur content in fuels, if necessary, to reach national air quality standards.

B. SUMMARY OF THE 1970 AMENDMENTS

The following summary is an introduction and a quick reference guide to the provisions of the 1970 Amendments that are of immediate concern to citizens. In the end, however, for an adequate working knowledge of the law, there is no substitute for careful reading of the full text of the Act, the Senate Report and the Guidelines.

1. *Air Quality Control Regions (Section 107)*

The 1970 Act retains the concept of *Air Quality Control Regions*, geographic areas in which a single air pollution control strategy will be followed. Some AQCR's were designated under the 1967 Act; under the 1970 Amendments the remainder of the country has been divided into regions. Many AQCR's include parts of several States in recognition of the fact that these areas share common air pollution problems that require coordinated solutions.

2. *Air Quality Standards (Sections 108 and 109)*

Under the 1967 Act, the federal air pollution control agency was required to publish technical documents to guide the States in setting air quality standards and developing implementation plans. *Criteria Documents*[3] were studies describing the concentrations of pollutants and lengths of exposure which produce specific adverse effects to health and welfare. *Control Technique Documents*[3] were summaries of the existing technological means for controlling given pollutants. The Criteria Documents, first published under the 1967 Act, provide the basic information on which national air quality standards are based.

The 1970 Act removed standard-setting power from the States, requiring EPA to set two types of *National Ambient Air Quality Standards*. *Primary Standards* were to be set at levels which, based on the Criteria Documents, are adequate to protect human health. These Standards must be achieved within three years of the approval of a plan implementing them (sometime in 1975 for most States). The *Secondary Standards* were to be set at levels to protect human "welfare" values. Congress intended these Standards to safeguard *all* values other than health, including visibility, plant and animal life, buildings and materials. Secondary Standards must be achieved within a "reasonable" time period, whose length is not specified. National Standards are expressed as permissible annual average concentrations, with short-term maximum concentrations which may occur only a certain number of times a year.

Under the 1967 Act, Criteria and Control Documents were published for five pollutants: hydrocarbons, sulfur oxides, photochemical oxidants, carbon monoxide and particulates. Nitrogen oxides were added to this list this year.

Standards for the six major pollutants were set on April 30, 1971 (they are listed at page 61). The Administrator must add to this list any other pollutant he finds dangerous to public health or welfare. Within one year after a pollutant has been listed, he must propose Standards for that pollutant and simultaneously issue Criteria and Control Documents. Proposed Standards must be made final after a 90-day comment period.

There has been considerable controversy about the levels at which the Standards have been set. Knowledge is admittedly incomplete, but past patterns demonstrate overwhelmingly that new research will uncover harmful health and welfare effects at ever low concentrations. Recognizing this, Congress provided for periodic revision of the Standards to reflect new knowledge, and directed that the current Standards be set to err on the side of caution. Primary Standards must leave an "adequate margin of safety" between allowable and known harmful levels, and Secondary Standards must protect from "known or anticipated" harmful effects.

On the whole, the Standards have been established at or just below levels where harm has been shown to occur to health and welfare. If anything, these Standards give less protection than suggested by the phrases Congress chose to describe the standards it wanted.

In effect, the Standards represent a federal ceiling on pollution. They are an effort to make pollution control uniform and to set adequate bases for abatement. They do not, however, prevent States from setting better standards. States are encouraged to set more stringent standards if they think their regions require them, or to protect regions with air quality already above the national Standards. This principle of "non-degradation" of presently pure regions has particularly strong support from Congress.

3. *Implementation Plans (Section 110)*

The Act requires each State to formulate an air pollution abatement plan for each air quality control region or part of one with the State boundaries. These *Implementation Plans* must set out in detail how the State intends to achieve and maintain the National Air Quality Standards in the required time. The Act requires one plan for meeting the Primary Standard and another for meeting the Secondary Standard, for each of the six pollutants, in each AQCR in the State. (In practice, many of the plans will be combined in single documents.) All plans must be written, subjected to public hearings and submitted to the federal Environmental Protection Agency for approval by January 30, 1972. EPA must approve or reject each part of the plan within the next four months. Any plan or part of a plan takes effect upon approval. If no plan or an inadequate plan is submitted, EPA must put its own into effect within six months.

Early in April, EPA proposed federal Guidelines elaborating on the requirements in Section 110 of the Act for the contents of implementation plans. These regulations were made final on August 14.

The Act and Guidelines require implementation plans to include these elements:

–A demonstration that the State air pollution control agency has *adequate legal authority* to carry out the measures of the plan. All laws and administrative regulations needed (with two exceptions) must be in effect at the time the plan is submitted to EPA.

–A *control strategy*. This must include a *survey* of the region's existing air quality and a detailed *inventory* of the emissions from all pollution sources in the region to help determine what kind of air pollution problem exists and what must be done about it. The control strategy must set forth all the *measures* that will be taken to make the region's air quality conform to the National Standards. These measures must include emission limitations, saying how much pollutant each source can emit, and other control procedures, such as process changes, fuel controls, land use and transportation controls, if they are necessary to meet the Standards. The control strategy must also include *timetables* for compliance with its control measures, and a *demonstration* that the control strategy will be adequate to meet the National Air Quality Standards in the required time.

–*Enforcement procedures* for making sure that the control strategy is followed.

–A *monitoring system*, including a network for sampling ambient air quality, and procedures for inspecting and monitoring emissions from each source of air pollution. Emission data must be reported to the State control agency, and these reports must be available to the public.

[3] See page 71 for ordering instructions.

–*Emergency procedures* for dealing with high-pollution crises.

–*Procedures for reviewing*–and *stopping*, if necessary–construction of new air pollution sources, modification of existing ones, and operation of all sources to be sure that they will not interfere with meeting an Air Quality Standard on time.

–*Procedures for revising the plan* when it is found inadequate, when new control techniques are found, when new Air Quality Standards are set, or when the State wishes to grant a variance from the original control strategy.

–*Procedures for inter-governmental cooperation*, including measures to insure that pollution from one region will not interfere with achieving Air Quality Standards in another.

–*Procedures for inspecting used autos* to enforce compliance with the control strategy.

–A demonstration that the State will have *manpower* and *funding* adequate to implement the implementation plan.

The Act and Guidelines require States to hold public hearings on any plan or revision of a plan before it is submitted to EPA for approval. Prominent notice of the hearing must be given and a copy of the proposed plan made publically available at least 30 days before the hearing date.

The Guidelines (section 420.3) also establish a classification system for AQCR's as Priority I, II or III regions, according to the severity of their pollution problems.

The Guidelines (section 420.7) also require submission of two series of reports beginning after a State's implementation plans are approved by EPA. Quarterly reports must contain information on current ambient air quality. Semiannual reports must describe current progress in carrying out the approved implementation plans and any revisions of rules, regulations or compliance schedules made in the plan.

4. *Extension Provisions (Section 110 of the Act, section 420.13 and Subpart C of the Guidelines)*

The Act and Guidelines provide for four different kinds of extensions:

–An 18-month extension of the deadline for submitting a plan implementing any National Secondary Air Quality Standard;

–A two-year extension of the time in which an air quality control region must comply with a National Primary Air Quality Standard;

–An extension of the time in which an air quality control region must comply with the National Secondary Air Quality Standard for sulfur oxides (the Act says the deadline must be a specified "reasonable time" after approval of the plan; the Guidelines say three years, but allow an extension of unspecified length if certain conditions are met);

–A one-year extension of the time in which certain sources must comply with certain measures of an implementation plan for either a Primary or a Secondary Standard.

All four extensions are hedged around with specific conditions and can only be granted by the Administrator of EPA.

5. *New Source Standards (Section 111)*

The Act requires EPA to first list, and after four months propose, performance standards for categories of stationary air pollution sources. Performance standards are limits on the amount of pollutant any source in these categories can emit, and must be set at levels requiring use of the "best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator [of EPA] determines has been adequately demonstrated." After another three months for comment from interested parties, the standards must be made final. The final standards apply only to "new sources," which are defined as any new construction of a pollution source and any modification of an existing source that will increase its emissions. They apply to construction or modification begun after the standards are proposed.

New source standards have so far been proposed by EPA for Fossil Fuel-Fired Steam Generators, Incinerators, Portland Cement Plants, Nitric Acid Plants, and Sulfuric Acid Plants, and final regulations are due in mid-November. EPA plans to expand the list of categories to about 40 within two years.

6. *Hazardous Pollutant Standards (Section 112)*

The Act requires EPA to set emission standards for hazardous pollutants, defined as air pollutants for which no National Ambient Air Quality Standard has been set, which cause increases in deaths and serious illnesses. These pollutants are first listed. After six months, emission standards for each are proposed, and after another six months, made final. No source can violate these standards unless it can demonstrate (1) that extra time is necessary to install control devices and that interim control measures will be taken, or (2) that adequate control technology is not available and continued operation of the source is vital to the national security. These extensions may last up to two years.

Three hazardous pollutants – asbestos, mercury and beryllium – have been listed, and proposed standards are due late in September. Other pollutants can be expected to be added to this list in the future.

7. *Federal Enforcement (Section 113)*

Section 113 of the Act details much-enlarged enforcement powers for the federal Administrator. Whenever he learns of any violation of a State implementation plan, he may, after due notice, issue a federal compliance order or commence a civil suit against the violator. Upon a finding that violations of a State plan are so widespread that they appear to result from a State's failure to enforce its plans, the Administrator may take over the Administration of the plan himself. He has similar powers to enforce the federal new source and hazardous pollutant limitations. Information leading to federal action may come from any source, including citizens.

8. *Federal Monitoring of Emissions Sources (Section 114)*

Section 114 of the Act outlines the monitoring powers that the Administrator is given in order to ensure compliance with federal emissions limitations or a State implementation plan. The Administrator may require a source owner to install emission monitoring equipment and report monitoring data and any other information requested to EPA. EPA is also given the right to enter any source, inspect monitoring and control equipment and sample emissions. The Act requires that any reports given EPA must be made available to the public. Information that would divulge trade secrets must be kept confidential, but *all* emissions data must be made available to the public.

9. *Title II of the Act*

Title II of the Act regulates fuel content and emissions from motor vehicles. It requires 90 percent reductions from 1970 carbon monoxide and hydrocarbon emissions standards by 1975, and similar reductions over 1971 nitrogen oxides levels by 1976. With the exception of California, the Act reserves regulation of new cars to the federal government, but States may regulate used car emissions.

10. *Citizen Suits (Section 304)*

One of the most important provisions of the 1970 Clean Air Act is the citizen suit provision. Section 304 of the Act allows any citizen to bring a civil suit against any polluter or governmental agency for failure to comply with emission limitations or a federal or State compliance order, and against the EPA Administrator for failing to carry out any "non-discretionary" duty under the Act. Federal judges may award attorneys' fees and litigation costs to any successful citizen plaintiff. In effect, Congress has for the first time made private citizens a vital part of pollution control enforcement.

C. TIMETABLE FOR SUBMISSION AND APPROVAL OF IMPLEMENTATION PLANS

1. Enactment of Legislation – December 31, 1971

2. EPA designates Air Quality Control Regions – March 1, 1971

3. EPA promulgates Primary and Secondary Air Quality Standards – April 30, 1971

4. States formulate plans with hearings

5. States adopt plans for both Primary and Secondary Standards and submit to Administrator for approval – January 31, 1972

6. Administrator publishes proposed regulations for plan if:
   (a) State fails to submit plan when due.
   (b) Plan submitted does not fulfill federal requirements.
   (c) State does not revise prior submitted plan within 60 days of notification

7. If State fails to submit adequate plan within six months, Administrator promulgates final regulations

8. Administrator approves or disapproves plans by April 31, 1971

9. If plan approved, State enforcement

II. CITIZEN ACTION

The purpose of this Part is to suggest ways in which citizens can achieve a single important goal – securing good State implementation plans. We will not deal here either with the problems of organizing and running citizen groups and coalitions, or with the rest of the broad range of concerns and activities of such groups.

Work on proposed State implementation plans is extremely important. The 1970 Amendments require States to draw together all their existing air pollution control measures, upgrade them where necessary to meet uniform federal law, present them at public hearings and submit them for federal approval. Once approved, a plan becomes the controlling set of rules for air pollution abatement for at least the next few years. This procedure makes the required hearings on proposed plans an important point at which the public can influence the entire control effort for each area and deal with specific problems that might not otherwise be publicly accessible. Opportunities missed during this phase will be difficult to make up after an implementation plan has been federally approved. This Part outlines some ways in which citizens can have the maximum influence on proposed plans.

A. INFORMATION

Your first problem is information. If you haven't already, learn about the air pollution problem in your area, what has been done about it up to now, and what can be done in the future.

1. *Know About Air Pollution*

First, a general knowledge of the kinds, sources and harmful effects of air pollution is essential. Two excellent sources of such information are the *Air Pollution Primer* published by the National Tuberculosis and Respiratory Disease Association, and the *Air Pollution Workbook* put out by the Scientists' Institute for Public Information. For detailed information on the harmful effects of the six pollutants now listed by EPA, federal Criteria Documents are valuable. See the bibliography for listings of these and other sources.

2. *Know the Problem in Your Area*

Detailed technical understanding of the air pollution situation is difficult for those without technical training, but you should try to learn as much as possible about its essential elements: which pollutants are being emitted, in what quantities, when, and by what sources. You will also want information on how this situation is expected to change as a result of new construction, changing traffic patterns, and similar factors.

The best sources of information are the authorities charged with air pollution control in your area. The first of these, the regional office of the Environmental Protection Agency, probably will not have much detailed information, but it should be approached for whatever it has. A listing of these offices and the States in each region appears on page 70.

Regional, interstate, State and municipal air pollution control agencies should have the best information on local conditions. State agencies are required by the 1970 Amendments and the federal Guidelines to compile a survey of existing ambient air quality and a detailed inventory of emissions for each air quality control region in the State. Though these are due early next year, they are the first step in writing an implementation plan and should be finished well before the entire plan is completed. Even if the inventory and survey are incomplete when you ask, you may be able to get parts of them or copies of older data. Keep watch on progress with the survey and inventory so you can get them as soon as they are done. If you have difficulty getting them, remember that these agencies are responsible for keeping the public they serve informed and that these data are public information.

Make your requests for information detailed and specific. Ask for the most complete information available. In addition to data on existing levels of pollution and inventories of emissions, request information on past trends and predictions for the future, what sources are now in compliance with State law and which ones have been the subject of past complaints, studies of health effects of air pollution in your State and of the economic impact of proposed control measures. Obtain federal Environmental Impact Statements for any pending federal or federally-financed major projects which will affect air quality in your region and State.[4]

EPA has contracted with ten consulting firms to assist several States with their implementation plans. (A list of the firms and the States with which they are working appears on pages 68-9.) Approach them in the same

[4]Copies of Environmental Impact Statements may be obtained from NTIS, U.S. Department of Commerce, Springfield, Virginia 22151 and Environmental Law Institute, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036.

way you would the State agency for information on your State's plan, including ambient air survey and emissions inventory data.

There are several other good potential sources of information. Try local or State chapters of organizations like the League of Women Voters, Tuberculosis and Respiratory Disease Associations, the Sierra Club and so on. Doctors in your area may know of health studies done on local pollution problems. Newspaper reporters may know about existing pollution conditions and might also provide valuable information on the political aspects of the situation. Professors at universities and research centers may be able to lead you to studies of local pollution problems.

3. *Know your Control Authorities*

You should also learn as much as possible about the organization of the air pollution control effort in your region and the people who staff it. Begin with the regional EPA office. These offices will play an important role as the federal representative in your region, particularly in enforcement. Implementation plans must be submitted through these offices, and they will be responsible for most federal enforcement of the Clean Air Act. New directors for many of the regions are now being appointed. Find out who they are, what qualifications they have and where their sympathies lie.

Learn as much as you can about the organization of the regional office, its staff and the functions it intends to perform. Try to establish contact with whomever in this office is responsible for your part of the federal region. Explain your organization and let these people know of your continuing interest in the implementation plan for your area and its enforcement.

Do the same thing with State and local air pollution control offices and whatever commissions, review boards and interstate or regional organizations exist. Your first concern should be with the State agency or agencies responsible for writing and submitting the implementation plan for your AQCR. If your region is an interstate one, remember that each State involved must submit a plan for its part of the region, but that these plans must be coordinated. You will want to pay attention to the plans for all parts of your AQCR and this will mean knowing all the agencies responsible for the plans, as well as any interstate authorities.

Next, learn about the local authorities. Proposed plans will have to state how these authorities will participate in enforcing the plan, and you will need to know them both to assess the plan and to monitor its implementation later on. Learn the structure and responsibilities of each of these organizations, and know the key personalities. Find out how well funded they have been and how they have performed, and learn as much as possible about their place in the political scheme of things. Develop contacts, particularly in the State agency, with the people responsible for the implementation plans, both as sources of information and as targets for your suggestions.

4. *Know Existing Air Pollution Laws*

Finally, it is important to become familiar with existing State and local air pollution control laws and administrative regulations. Implementation plans will be essentially statements of how these laws and regulations will be used to reach and maintain the Air Quality Standards. The federal Guidelines, with two exceptions, require that laws and regulations on which plans submitted in January are based must be in effect at the time of submission, and copies of these must be included in the plan. One of the major concerns in assessing a proposed plan will be to determine whether existing law is adequate to carry it out. You must also be equipped to deal with situations where existing law is clearly inadequate but the State is incapable of doing anything about it before January 30. Both problems require a working knowledge of existing law.

Some States have submitted implementation plans to EPA under the 1967 Clean Air Act. Twenty-one plans were submitted by fifteen States for thirteen air quality control regions. Section 16(a)(1) of the amended Act requires EPA to approve or reject these plans and to state how unacceptable parts must be revised. Though parts of the plans have been approved, none was accepted entirely, and States are given until January 30, 1972, to make the necessary revisions. Find out if your State submitted a plan, and what parts were accepted and rejected. Ask the regional EPA office for a detailed statement of the changes that must be made by January 30.

B. GET THE PROPOSED PLAN

To make an adequate assessment of a proposed implementation plan and have real influence on its final content, it is essential that you obtain copies of the proposal as far in advance of the hearings as possible. Plans are sure to be long and complex, and your criticisms can be made in important ways well before the hearings, so give yourself as much time as possible.

Section 420.4(b) of the federal Guidelines requires State agencies to give "reasonable notice" of hearings on proposed plans. "Reasonable notice" includes, at least 30 days prior to the date of hearing(s):

- Notice given to the public by prominent advertisement announcing the date(s), time(s), and place(s) of such hearing(s) and the availability of the principal portions of the proposed plan, including, as a minimum, all rules and regulations which are proposed to be included in such plan, for public inspection in at least one location in each region to which the plan will apply.

- Notification to the federal Administrator (through the appropriate regional office).

- Notification to any local air pollution control agencies in each region to which the plan will apply.

- In the case of an interstate region, notification to any other States included, in whole or in part, in the region.

The Guidelines also require the State to submit a complete transcript of the hearings, copies of all advertisements or broadcasts giving notice of hearings, and a certification that the hearing was held. States are allowed to hold several hearings on proposed plans and to hold separate hearings for plans implementing Primary and Secondary Standards. The notice procedures apply to all such hearings.

These are unusually strong requirements for public notice. Often announcement of administrative hearings, if made at all, appears in the back page legal-notice section of newspapers just before the hearing date, and the proposals to be discussed are not released in advance. The Guidelines take care of these problems reasonably well, but the required procedures are not perfect and should not be relied upon to give adequate time to examine a proposed plan.

Thirty days may not be enough time; certainly more would help. Also, the Guidelines require advance availability only of "the principal portions of the proposed plan, including, as a minimum, all rules and regulations which are proposed to be included in such a plan." This is good as far as it goes; the rules and regulations are the heart of the plan. But it may mean that the agency won't (and won't have to) make available other elements of the complete plan, such as the ambient air survey data and emission inventory, the assessment of the resources needed and available for carrying out the plan, the description of the surveillance system to be used for monitoring ambient pollution levels or the assessment of the adequacy of the control strategy to achieve the Air Quality Standards in the allotted time. Finally, the Guidelines require not that copies of the proposal be distributed, but that one copy be made available for public inspection in each air quality control region. This will make it physically difficult to examine the plan, unless it can be copied in some way.

To a certain extent these provisions are no doubt geared to spare hard-pressed agencies extra work, but the shortcomings in these procedures and other tactics can be used by an uncooperative agency to hinder citizen participation. An agency might keep to the minimum requirements, giving 30 days notice and interpreting "prominent advertisement" as narrowly as possible, presenting only proposed rules and regulations and refusing to allow duplication of the public copy of the proposals. An agency might also stall giving notice for several days, present an incomplete version of proposed rules and regulations, introduce last-minute changes in a proposal, or, conceivably, fail to comply with the Guidelines at all.

It is a good idea, then, to take several other steps to make sure that you have adequate advance access to a proposed plan.

The most efficient way of dealing with the problem of getting a proposed plan in advance is to develop a working relationship with someone in the State agency who is responsible for writing the plan. In many cases agency officials will realize that informed citizen participation can only help them and will take steps to encourage it. Even if the head of an agency is distant, someone below him might be willing to cooperate. Building good relationships of this sort can be one of your most valuable accomplishments. You may be able to get copies of the proposed plan well in advance from an agency contact, and keep on top of changes made in it. You should also try to sit down with people from the agency to discuss your suggestions for changes in detail.

Even if such close contact seems unlikely, try as soon as possible to arrange a meeting with the State agency to discuss their plans for meeting the notice requirements. Remind them of the federal Guidelines and argue that wide public knowledge of the proposed plan is in their best interest, since it will help build public support to counteract industry pressure. Press them to print up and distribute copies of as much of the proposed plan as possible, or at least to allow duplication of the display copy.

Ask them to make public any changes in the proposal as soon as they are made, and to postpone the hearing if major changes are made just before the original hearing date. Examine your State's administrative procedure rules for any requirements for notice of hearings and advance publication of proposals that stiffen or extend those in the federal Guidelines, and point these out to the agency.

If the agency appears disinclined to follow proper procedure, complain immediately to the regional director of EPA and address letters to the head of the State agency, Administrator Ruckelshaus, your Governor, other political figures who might have an influence in the matter, and newspapers. Also, generate public pressure on the agency to comply with the Guidelines and to go beyond them, if possible. If, as a last resort, you consider the agency's inaction serious enough to warrant legal opposition to the entire plan, you should serve notice of your intention right away. Sometimes the threat of legal opposition can move an agency where persuasion will not. However, though sometimes effective as a prod to the agency, legal action in these circumstances is not to be preferred. See page 53 for a discussion of legal action over procedural irregularities.

C. PREPARE A CRITIQUE OF THE PROPOSED PLAN

The next step is to analyze the proposed plan and prepare a critique. This is a tough job. Time is short even in the best circumstances, and you will be in the uncomfortable position of the layman criticizing procedures even the experts are not sure about. But the criticisms must be made, and there are a number of things citizens can do to make them influential and constructive.

In the first place, concerned citizens often need not go without expert advice at all. You may be able to get professional help in examining the legal and technical aspects of a proposed plan, and the fact that you have had such help will add considerable weight to your criticisms. Try to locate engineers, scientists and medical doctors who are willing to analyze the technical data and control measures of your plan. Graduate students in these fields may be particularly helpful.

You might also argue to the State agency or to EPA's regional office that you should be allowed free use of their scientific resources – for example, for explaining the assumptions underlying the control strategy or for evaluating your alternatives to their measures for reaching the National Standards. This contention may be greeted with surprise by the agencies, but you should remind them of Congress' statements that citizens are to be valued participants in the implementation of the Act.

Attorneys will be able to assess the provisions of proposed plans from a legal standpoint, determine adequacy of existing law to implement the plan, and help with any legal action associated with notice procedures or submission of the plans. Look for legal help the the faculties and environmental law societies of nearby law schools, the legal committees of groups like the Sierra Club and the environmental law committee of the State Bar Association. NRDC is also building a network of cooperating attorneys, some of whom will be available to help in their areas.

It is important to remember that, even with no technical or legal help at all, laymen are capable of reviewing key elements of proposed plans and making substantial constructive criticisms. Parts III, IV, and V of this Manual are designed in part to tell laymen where to look in a proposal for weaknesses and loopholes and how to correct them, and to suggest additional measures they can press for.

Section 420.5(c) of the federal Guidelines states that all or part of a proposed implementation plan can be submitted to EPA before January for a preliminary review. Requests for such review must be made in writing to the regional offices of EPA and the Guidelines recommend that they be made by the end of October. The introduction to the Guidelines says that results of the preliminary reviews will be made public. Find out from your regional office when such requests are made for your area's plan, and ask to be given copies of the draft submitted for review and copies of EPA's comments. Do this promptly and insist on receiving copies of all the relevant documents. The review can be extremely useful in your criticism of a proposed plan. If you have difficulty in getting copies of a review, contact the Project on Clean Air office in New York. We will attempt to get copies of all reviews made and distribute them to citizen groups.

Prepare a written critique of the proposed plan. Make it detailed, factual and concise. Follow each criticism of a part of the proposal with specific suggestions for improving it. List and present arguments for additions you think are necessary. Make specific reference to expert opinion, technical documents and basic documents like the 1970 Amendments, the Senate Report, the National Ambient Air Quality Standards, the Criteria Documents, the federal Guidelines and parallel State and local documents. Try to suggest specific legal language for revisions or additions to the regulations in a proposed plan. Example regulations appear on pages 62-7.

Prepare different versions of the basic critique for use with different audiences. Make the main points the core of each presentation. For purposes of public education, for example, these points might be expressed in their most general form and backed up with a demonstration of their importance to the average citizen. For press work, the main criticisms can be made in releases and documented in an attached fact sheet. For use with agency staff and at the hearings, the full version of the critique is best.

D. USE THE CRITIQUE

Next you should begin using your analysis to have the maximum impact on the shape of the final plan. Much of this use – perhaps the most important parts – should occur before the hearings.

If your relations with the State agency are good, you should exploit them to the fullest before hearings. Send copies of your critique of the proposed plan to the agency and to the regional EPA office. Follow up with phone calls to the people responsible for writing the plan asking if the comments were received and if any points need clarification. Arrange meetings with these people, if possible, to discuss your critique in detail. Cover as much ground as possible in phone contacts or in meetings, asking whether your suggestions are being incorporated into a revised plan and what other changes are being made in the proposal before the hearings. Keep at it. Don't assume that your arguments will make it on their own. The more exposure the State agency has to your arguments, the more likely they are to penetrate. And the more forceful, persistent and sophisticated your arguments, the more seriously you will be taken by the agency. If used properly, a good relationship with the State agency can accomplish more than anything else you do.

At the same time that you prod the agency, make the proposed plan and your criticisms known to other people who can influence the agency. Send appropriate versions of your comments to right-minded politicians and press them to do what they can with the agency. Send copies of the critique to local air pollution authorities who will play a part in enforcing the final plan, and to other governmental entities charged with some aspect of air pollution control for your area. Trade comments with other conservation or environmental groups in your area who can be expected to bring pressure on the State agency. Publicize the most newsworthy items of your critique in the local media and incorporate the major points in any public education activities you conduct to build support. In general, the more widely known your position on the proposed plan, the more likely it is to be finally taken into account.

E. HEARINGS

Appearance at the hearings will serve two purposes: to influence the content of the proposed plan and to serve notice that concerned citizens will be watching its implementation and enforcement. The second is as important as the first. It is popular now to predict that citizen involvement in air pollution issues will fall off after the initial surge of enthusiasm over the 1970 Amendments. A sure way to prove to control agencies, politicians and industry that these predictions are correct is to fail to appear in force at the implementation plan hearings.

The first step is to secure proper notice of each hearing held. The most conspicuous announcement possible will be important not only to give you adequate time to prepare but to help you mobilize public opinion and a large turnout at the hearing. Again, the notice provisions in the federal Guidelines are good, but don't rely on them alone. Follow the steps suggested on pages 11-12. Know your State rules governing public hearings. If you meet with the agency to discuss advance disclosure of the proposed plan, press them to broadcast announcements of the hearings on radio and television[5] and run prominent ads in major papers. Try for more than thirty days' notice. Make sure the same procedures are followed for each hearing to be held. Try to get a schedule of planned hearing dates as soon as possible. If you are told these are not fixed yet, keep trying. Your pressure may produce certainty sooner. The sooner you know the better. The Project on Clean Air will be assembling a list of schedules during the fall, and you will be sent information as it becomes available. If the agency is uncooperative or fails to give adequate notice, raise a

[5] Do not be put off by a claim that such broadcasts would be too expensive. Radio and TV stations are required to show the FCC how they are serving the needs of the community in order to keep their broadcast license, and most of them will be happy to make such announcements, often for free, in order to enhance their position with the FCC.

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public fuss and start writing letters. If the situation is serious enough, explore the possibility of legal action.

Arrange for witnesses to present your critique at the hearings. If lawyers, scientists, engineers or doctors have helped prepare the arguments, have them testify to lend maximum weight to your presentation. Though it may not be recited verbatim, make sure that the full text of your arguments, including whatever detailed material is necessary to back them up, is submitted as testimony in such a way that it appears in full in the transcript of the hearings. This transcript will be submitted to EPA along with the plan and constitutes the legal "record" upon which EPA must base its decision whether to approve the plan. Subsequent attempts to demonstrate that a submitted plan is inadequate, or legal action to overturn EPA's approval of an inadequate plan will rest entirely on the record of evidence presented at the hearings, so your arguments for that record should be as complete as possible.

Try to anticipate arguments that your opponents at the hearings will use. Pay attention to public pronouncements on the proposed plan by spokesmen for industry, and try to get copies of any written comments they make on the proposal. You will want to counter vigorously any public arguments made by industry before the hearings, particularly threats about the dire economic consequences of air pollution control. Some arguments might not appear until the hearings, though, and since your answer may not be written into your basic comments, you will want to be able to add them to your testimony on the spur of the moment.

Stimulate as large a public turnout at the hearings as possible to support your views. If you do not think the agency has given adequate notice of the hearings, do it yourself. Urge other citizens' groups to appear at the hearings. If they are not preparing their own testimony, try to get them to make statements supporting yours. If they can not appear at the hearing, have them mail their statements in. Statements presented in writing, even by mail, become part of the record just as if presented in person.

F. AFTER THE HEARINGS

Don't quit after the hearings. Usually the period for submitting evidence to the record extends after the hearing. Keep building your case by having other groups send supporting statements.

Start immediately trying to find what changes are being made in the proposed plan as a result of the hearing. Keep after any contacts you have in the agency. If you find that something you favor isn't being done, keep arguing for it. Find out when transcripts of the hearings and copies of the final plan will be available and put in requests for them. If the transcript is incomplete or the final plan does not take account of your arguments, make your objections public and put pressure on the agency. Send a letter stating your objections, along with copies of your comments, to your Governor, your regional EPA office, Administrator Ruckelshaus and anyone else who might be able to influence the agency before submission of the final plan. If the final plan is seriously inadequate, consider taking the legal action discussed on page 53.

In some cases, the preliminary review of a proposed plan by EPA will be completed after the hearings. It is still important to get a copy of the review and use it where possible to press the agency for needed changes.

III. CONTENT OF THE PLAN

This Part deals with the elements of an implementation plan required by the Act and the Guidelines. Since the final Guidelines are not required under the Act, and since they elaborate so extensively on the Act's provisions, an introductory discussion of them is important.

A. THE FEDERAL GUIDELINES

Even though not required by the Act, promulgation of the Guidelines was entirely within EPA's discretion, and the final regulations have the force of law.

On April 7, EPA published proposed Guidelines. By late June, EPA was ready to publish Guidelines that had been revised in response to comments from a broad range of interested parties. Substantial improvements had been made:

–"Reasonable notice" of public hearings was extended from 21 to 30 days and defined to include prominent announcement and 30 days' advance public availability of proposed implementation plans.

–A statement of policy favoring non-degradation was added, using the same language as the non-degradation clause in the National Ambient Air Quality Standards.

–Requirements were added for public availability of emissions monitoring data reported to control authorities.

–Requirements for compliance schedules and conditions for variances and exemptions were tightened.

–Use of low-sulfur fuel–a prime means of controlling SO_2 pollution–was encouraged more than in the April 7 proposal.

–Appendix B, containing detailed example control regulations to which several exemption procedures were keyed, was strengthened.

Shortly before final publication, the revised Guidelines were pulled into the White House Office of Management and Budget for what was described as a "routine review". One and one-half months later, Guidelines were finally published that had been weakened considerably in several important ways. We believe changes were made in response to heavy industry pressure and comments from federal agencies–among them the Federal Power Commission, Department of Defense and the Commerce Department–that were made well after the formal comment period was over. There was no public access to this review.[6]

In our opinion, some of the changes are not binding because they run counter to the letter and spirit of the Act. Some sections deleted from the final regulations, moreover, should have been retained.

The largest change in the Guidelines resulting from OMB's "review" was the insertion of language encouraging consideration of the costs of pollution control in writing a control strategy. These changes leave the Guidelines perilously close to, if not beyond, the limits of what the Act will allow, and may have serious practical effects on the quality of State implementation plans. The changes fall into three categories:

1. Sections 420.2(b) and 420.10(a) both encourage consideration of the "cost-effectiveness" or the "costs and benefits" of alternative control strategies.

2. Several parts of the Guidelines contain new language encouraging States to consider the "social and economic impact" of a control strategy before adopting it:

–section 420.2(d) so encourages, and expands "social and economic impact" to include "impact on availability of fuels, energy, transportation and employment."

[6] Skeptics will note that EPA has furnished us printed proof of the existence of a revised version of the Guidelines that was about to be published when the Office of Management and Budget stepped in at the last moment. In Appendix L of the final Guidelines (page 15504 of the *Federal Register*), in the midst of suggested regulations for emergency episode control plans, appear sections 1.6, 1.7, 1.8 and 1.9. These regulations have nothing to do with emergency procedures. They are *similar* to regulations that appeared in the original, April 7, proposed Guidelines, but not the same. Part of EPA's revised version of the original Guidelines, they were cut by OMB and appear in Appendix L by mistake because they were set up in type next to the emergency regulations. The fact that they were set up in type indicates how close the revised version of the Guidelines was to publication when OMB intervened.

–section 420.1(o): "reasonably available control technology" is defined as devices permitting attainment of the emissions limitations in Appendix B, provided that, in requiring such devices, the State consider the social and economic impact of those limitations. This definition reappears in key places throughout the Guidelines:

> –in section 420.14(c)(3), requirements for nitrogen oxide control measures are keyed to the definition;
>
> –granting of the 18-month deadline for submitting a plan for Secondary Standards is contingent in part on existence of reasonably available control technology;
>
> –the deadline for compliance with a Secondary Standard plan is dependent on the existence of reasonably available control technology and the social and economic impact of its application.

It can be inferred from the Act and its legislative history that Congress did not intend this kind of language to influence air pollution control efforts. The House version of the 1970 Amendments was peppered with phrases such as "giving due consideration to the economic and technological feasibility of compliance." The Senate-House conference committee cut all such wording from the final version of the Amendments (with the sole exception of a reference to cost considerations in Section 111, the federal new source standards section). This was plainly deliberate. Congress meant for the new source performance standards to be determined partially by economic considerations, and it meant for State emission limitations to be determined by considerations of public health and welfare.

Thus the phrase "reasonably available control technology" does not appear anywhere in the Act in connection with National Air Quality Standards or State implementation plans. The Senate Report uses this phrase in connection with the federal new source standards, but the Guidelines distort the meaning given it there. As the Senate Committee described "reasonable availability," it was meant to require the best technology presently available. "Availability" did not mean

> "that the technology must be in actual, routine use somewhere. It does mean that the technology must be available at a cost and at a time which the Administrator determines to be reasonable."[7]

The Guidelines state that the emission limitations in Appendix B can be met with what the Administrator considers to be "reasonably available control technology." Presumably, in arriving at these limitations, the Administrator has already considered, as the Senate Committee suggested, the cost of the technology needed to meet them. Yet the Guidelines go on to say that, in considering the application of the Appendix B limitations and their corresponding technology, States may *again* consider their cost. This is not merely redundant. It encourages States to reject for economic reasons technology that has already been adjudged "reasonably available" by EPA, a result that Congress almost certainly did not intend.

This will have serious practical effects. Because of the difficulty of saying which emissions limitations must be applied at a source in order to meet a given Air Quality Standard, uncertainty usually exists in deciding which device to use for a given source. Frequently several devices, of different efficiencies and costs, are available. Congress' use of "reasonable availability" was not meant to allow EPA a choice in setting new source standards between a more and a less efficient device on grounds of their relative cost, *unless* the more efficient device was so much more expensive as to impose a virtually impossible financial burden. Congress could hardly have meant for EPA to import a less stringent concept of "availability" into State emission limitations through the back door. Precisely because of the technical uncertainty about which device to use to reach a Standard, and because of the urgency of combatting the air pollution crisis, Congress intended that States' control efforts, aimed towards meeting health and welfare standards, err on the side of caution and use the more expensive and more effective device. There was to be no cost-effectiveness juggling between two devices both of which could be afforded, yet this is exactly what the language of the final Guidelines now appears to condone.

The language also gives polluters more leeway to make the typical arguments about the dire economic effects–to themselves, their employees and the economy–of using the best available technology. Most of these arguments are not true to begin with; most plants will not close down if they are forced to clean up as much as possible. The recent Annual Report to Congress of the President's Council on Environmental Quality estimates that the average cost to industry of controlling emissions will amount to less than seven percent of their capital investment. That some plants will close down, however, is not necessarily undesirable. In passing the 1970 Amendments, Congress made it clear that it was responding to a crisis situation, and that bold changes were necessary to cope with it. Marginal operations that survive by polluting free of charge *should* close down. The Senate Report says:

> "In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the qestion of whether the early achievement of ambient air quality standards protective of public health is technically feasible; and, 2) the growth of the pollution load is many areas, even with the application of available technology, would still be deleterious to public health. Therefore, the Committee determined that the *existing sources of pollution should either meet the standard of law or be closed doun...*"[8]
> [Our emphasis]

The "social and economic impact" language of the final Guidelines lets polluters retreat to less disruptive, cosmetic control measures when what may well be required is stronger measures that may have a pronounced, but desirable, impact.

There is very good evidence that EPA, despite the final Guidelines, thinks along the same lines. In a March, 1971 document called "Necessary Legislative Considerations for Coordinated Local, State and Federal Air Pollution Control Programs," they refer to language common in existing State law requiring control authorities to consider

> "the character and degree of injury to, or interference with ... the rightful conduct of business, and the physical property of the people; the social and economic value of the air pollution source ... and the technical practicability and economic reasonableness of reducing or eliminating the emission resulting from such air pollution sources."

"In our opinion," says EPA,

> "this type of provision is inappropriate for an air pollution control law. Such a catalog of considerations represents an unaccountable disgression from the proper emphasis of the law. The thrust of the law should be protection of public health and welfare, first and foremost. *In some instances, for example, air pollution can so endanger public health that abatement is necessary even if no practical and economical method of control is available.* Considering the hazard to public health and welfare presented by air pollution such a recital in the law cannot be permitted to prevail over actions necessary to protect the public. Such an unfortunate enumeration places a cloud on the entire system of the powers to prevent and control air pollution under the law."
> [Our emphasis]

3. As a replacement for the original non-degradation clause, the final Guidelines now discourage

> "a State to prepare, adopt, or submit a plan which does not provide for the protection and enhancement of air quality so as to promote the public health and welfare and productive capacity."

In their use of the phrase "productive capacity," the Guidelines pervert a phrase which was used previously. In Section 101, Congress lists the purposes for passing the Act. Section 101(b)(1) says that one of the purposes was

> "To protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the *productive capacity of its population....*" [Our emphasis]

This phrase is hardly ambiguous – it means that the point of the Act was to protect the health of the people. Healthy people are more productive, and thus adding the phrase "productive capacity of its population" amounts to restating the same point.

By truncating the phrase, the Guidelines suggest that "productive capacity" means the productive capacity of industry. You should be on guard to prevent your State agency

[7] *Sen. Rpt.* at 16.

[8] *Sen. Rpt.* at 2–3.

from adopting this reading of section 420.2(a). Make sure that you point out the true meaning of the phrase, both to the agency and to the public, so that the Guidelines' suggestion does not become the guiding interpretation in your State's proceedings.

Finally, remember that you may be able to turn to your own advantage the phrase "social and economic impact," as it appears in sections 420.2(d) and 420.1(o) of the Guidelines. The social and economic impact of weak pollution controls can be demonstrated to be worse than the impact of imposing strict controls. The Council on Environmental Quality Report estimates that the costs of air pollution to every man, woman, and child in the United States amounts to more than $80 per year, or some $16 billion total annually. By contrast, the CEQ estimates that the total cost of reducing pollution over the next five years should come to only about $23.7 billion, or less than $8 billion annually.

Several other serious changes made through OMB deleted important sections of EPA's revised Guidelines. A requirement for authority to institute permit systems for construction of new stationary sources and modification of existing ones was deleted. The pollutant concentrations used to designate Priority I areas were raised substantially, thereby making fewer air quality control regions susceptible to the fullest requirements of the Guidelines. The utility and suggestive power of Appendix B was reduced substantially. Most of the first section of the Appendix, containing example administrative regulations for implementing a control strategy, was cut. The suggested emission levels for each pollutant in the remaining sections of the Appendix no longer appear as regulations and thus lose much of their suggestive force. We have attempted to fill the gap left by these changes by including on pages 62-7 example control regulations based heavily on those originally recommended by EPA.

B. LEGAL AUTHORITY

Section 110(a)(2)(F)(i) of the Act says that an acceptable implementation plan must provide "necessary assurances that the State will have adequate . . . authority to carry out [the] implementation plan." The Guidelines specify what kinds of authority the State must have.

Section 420.11(a) requires States to have authority to:

- Adopt emission standards and limitations and other measures needed to meet the Air Quality Standards;

- Enforce applicable laws, regulations and standards, and seek injunctive relief;

- Take emergency control action when high air pollution episodes occur;

- Prevent construction, modification or operation of stationary sources that will threaten attainment of Air Quality Standards;

- Obtain information necessary to ensure that sources comply with the implementation plan; and,

- Require sources to monitor and record their emissions and report this information to the State control agency, and to make this information publically available.

Section 420.11(d)(1) requires that this authority exist at the time the plan is submitted and 420.11(c) requires the State to submit copies of the laws and regulations that furnish the authority along with the plan. Section 420.22 goes further and requires that all emission limitations, and whatever other measures form the heart of the control strategy of the plan, be adopted as rules and regulations by the time the plan is submitted. These are stiff and important requirements: the State must not only have authority to make the necessary regulations, but it must have made them by January 30.

Two additional kinds of authority – for inspection and testing of auto emissions and transportation controls, and for land use control measures – do not have to exist when the plan is submitted. If such authority is needed for the plan, however, timetables for getting it must be submitted with the original plan. Auto emission inspection and land use and transportation control should be important elements of many implementation plans, particularly in urban areas. Delaying the requirement for authority for these measures recognizes the fact that many States do not have and cannot get the authority on time, but it also de-emphasizes the urgent need for these measures. Make sure that the timetables for getting the necessary authority are as short as possible.

Section 420.11(e) allows the State to place responsibility for carrying out portions of the plan on agencies other than the air pollution control agency, as long as the plan proves that the necessary authority exists or states a timetable for getting it. This is a critical provision.

There is likely to be considerable resistance to including measures other than stationary source emission limitations – such as land use and transportation control measures – in a control strategy. State agencies may argue that they haven't the authority, expertise or manpower to carry out such measures. It is critical that the resources of other State governmental agencies – planning commissions, highway departments, public utility boards, etc. – be used where necessary to help implement and enforce a control strategy. This provision of the Guidelines makes it clear that this can and should occur, and requires the legal basis of other agencies' cooperation to be settled in advance.

Similar considerations apply to section 420.11(f), which allows the State to let a local agency carry out all or part of an implementation plan, as long as (1) *all* the necessary authority exists, and (2) the State is not relieved of its responsibility for carrying out the entire plan. This second provision is also extremely important. Without it, States would be tempted to dump part of their heavy enforcement load on local authorities and wash their hands of all responsibility. With the provision, the State can still be sued for any failure to step in if the local authorities do not enforce the plan.

The notice provisions in the Guidelines do not explicitly require the legal authority of the proposed implementation plan be made available to the public in advance. If it is not, write letters like the one on page 73 to your Governor and Attorney General, and to the head of your State agency in order to get them on record as to the legal authority they have.

With or without the State's opinion, get someone with legal training to make his own written assessment. Send copies to the Governor, the Attorney General and the State agency. If existing authority is inadequate, make sure your assessment suggests language that would correct the inadequacy, and urge its adoption. Publicize the inadequacy. Your State may try to ignore it in hopes of evading its responsibilities after January. Don't let the State miss any opportunity this fall to patch up its legislation.

If you can't get any assessment from the State before the hearings, check with the Project on Clean Air staff. We have replies from about half the States to a letter like the one on page 73. Since all of them assure us State authority is adequate, they could be useful in States which now claim they do not have adequate authority. If your assessment shows inadequacies, send it to the regional EPA director and to Administrator Ruckelshaus, asking them to reply to you and to contact your State. Be prepared to make your arguments at the hearings and to follow them up afterward if they are not heeded. Remember, in pressing for additional necessary legislation or regulations, push at the same time for additional authority you want that is not required by the Guidelines.

What do you do if there is a gap in your State's legislation, and the State admits it, but the State legislature will not meet until after the January 30 deadline? This can be sticky. The Act and Guidelines are unequivocal: the necessary authority *must* exist when the plan is submitted; there is no provision for extension of the deadline for Primary Standard plans, and EPA is required to step in if the plan is inadequate. Yet if a State is well-intentioned, there should not be any need for EPA to intervene because of something the State cannot control. Of course, if the State is *not* well-intentioned and uses the failure of its legislature to meet in order to delay, it may be desirable for EPA to intervene.

Otherwise, some EPA-State bargaining will probably occur, in which EPA makes the State promise to have the necessary authority by a certain time, and promises not to intervene until then. This can happen unchallenged because the Act says that EPA must promulgate its own plan for a State within six months after it rejects the State's proposal, unless the State comes up with something adequate before the six months are up. Since EPA has four months after January 30 to approve or reject a plan, the State may have anywhere from six to ten months to get the legislative authority it needs to submit an acceptable plan.

If your State is in this kind of fix and has a good plan otherwise, try at the hearings to get it to commit itself to a specific timetable for getting the needed authority. This will give EPA a welcome opportunity to wink at the Act and Guidelines. But remember two things. First, EPA can accept parts of a plan and reject others. Make sure the parts of the plan for which authority already exists go into effect on time. Second, do not let a State that has little or no intention of submitting or enforcing a plan anyway use this mechanism to buy time.

Pages 62-7 give examples of emission control and enforcement regulations that might go into an implementation plan. These examples are based heavily on EPA recommendations. Entries in the bibliography list sources of existing State laws and discussions of them. Copies of the Council of State Governments "Model Air Pollution Control Act," and an EPA document stating which parts of the Model Act meet the requirements of the Guidelines, and upgrading the parts of the Act that do not, are available from the Project offices.

C. CONTROL STRATEGY

The heart of the State plan for controlling pollution is the control strategy – an assessment of the pollution problem in each region and a set of regulations for correcting it. This is also the most theoretically complex and esoteric part of the State plan, which can involve the use of computer modeling techniques to evaluate the alternative methods for reaching the National Air Quality Standards.

The basic elements of a control strategy are spelled out in the Guidelines. Briefly, the control strategy must include:

–A *survey* of the existing ambient air quality in each region;

–A point-by-point *inventory* of the sources of pollutant emissions in each region;

–A detailed description of the *measures* which will be used to reduce emissions from each source;

–A set of *timetables* for implementing these measures for each source; and

–A *demonstration* that, using these measures and timetables, the State can attain and maintain the National Air Quality Standards within set time limits.

The *air quality survey* is needed to determine how badly each region is polluted and how much it must clean up in order to meet the National Air Quality Standards and maintain clean air as the region grows. Since many regions cannot obtain adequate data in a short time, the Guidelines provide means for estimating air quality where data are missing.

A detailed *emissions inventory*, describing the sources of emissions in the region, must be prepared for most regions to identify the sources which the State's strategy must control. To aid States in preparing detailed inventories, EPA has retained ten consulting firms expert in air pollution matters. Their names and the States in which they are working are listed on page 68.

Using information on air quality, and the emissions inventory, the State must formulate a set of *control measures* which will be used to obtain the necessary emission reductions to meet and *maintain* the National Standards, and *timetables* for each source for meeting these goals. Timetables must be set for the State as a whole for meeting the Primary and Secondary Standards, and timetables for individual polluters – "schedules of compliance" – for meeting State emission limitations and other requirements.

Finally, the control strategy must include a demonstration that it will produce the desired results – ambient air quality protecting public health by 1975, and public welfare within a reasonable time (i.e., air quality meeting the National Standards).

Plainly, large parts of these elements of a control strategy will be highly technical and difficult for you to evaluate. However, take comfort. The executives and attorneys for the companies who seek to weaken the State's strategy, in all likelihood, will find the technical details of the State plan as difficult to fathom as you will, and will therefore probably attack the portions of the plan they (and you) can understand. Furthermore, most of the most important decisions to be made are not technical decisions at all, but rather choices of what tactics to pursue, who will pay the costs, and how the strategy will be enforced. You are as qualified as State policymakers to decide these issues, and you should be careful not to let yourself be convinced otherwise. Of course, you will often need technical information – both legal and scientific – to help you evaluate alternatives. But you should see the technical information for what it is – a tool to help evaluate policies, not to manipulate them.

1. *Alternative Means of Controlling Air Pollution*

There are a number of approaches to controlling pollution, and the Clean Air Amendments direct the States to use any, or if necessary all, of them to attain the National Air Quality Standards. The Guidelines rely heavily on emission limitations, giving detailed guidance about what is available and how to implement and enforce them. This is natural: emissions limitations involve the most detailed engineering questions and they are the familiar currency of professional air pollution control people.

You should remember, however, that other methods of control may be more effective, and have far more worthwhile long-term effects on the environment. Pollution from private automobiles can only be controlled by substituting more efficient systems, such as mass transit for our basic means of transportation, or by arranging our land-use so that large-scale commuting is unnecessary. In the long run, pollution from power plants and industrial facilities must be curbed by limiting the spiraling demand for electric power and our uncontrolled consumer economy. Pollution is not merely a nuisance, albeit a dangerous one, which we can control by gadgets; instead it is an integral part of the way we live. Only by basic changes in our style of living can we reduce its effects. You should, therefore, not allow your energies to be drained by extended struggles over whether, for example, a bag house or an electrostatic precipitator will be more effective at controlling stack gases. You should conceive the purposes of the Clean Air Amendments more broadly, as the invitation Congress meant them to be to ask for major restructuring of living patterns in your State in order to produce a saner, less polluted, way of life – and you should press your State agency to implement this vision as it was intended, by adopting an implementation plan which will accomplish this objective.

The following discusses some of the alternatives you and your State can consider. Those which go beyond emissions controls are not legally required except in air quality regions where emissions limitations will be insufficient to reach the National Standards. But a State is free to adopt any methods it wishes, and you should support the more ecologically sound ones even where they are not required by federal law. The State hearings, you should remember, are more than merely administrative proceedings to adopt a code of regulations. They are a forum in which to educate the people of your State to the real cause of what Congress called the "crisis" in public health from polluted air, and to seek the basic changes which are necessary to reverse its growth.

The term "control strategy" has been used advisedly by EPA to suggest that a State plan will be an integrated set of sub-plans for dealing with specific aspects of the pollution problem. For each type of pollution, there are several possible means of control, and the State's strategy may well represent a blending of different methods. Your job will be to make sure that this blending does not result in a weak plan masquerading as a strong one.

The six major pollutants with which the State's plan must deal are sulfur oxides, particulate matter, hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides. This Manual will not explain in detail their origins and effects (for more information, we recommend the excellent handbook published by the National Tuberculosis and Respiratory Disease Association; other works on the pollutants are listed in the bibliography to this Manual, which appears on pages 71-2).

For the purposes of a State implementation plan, the important point to remember is that the major pollutants are produced by (1) the burning of fuel in large sources such as power plants and industry; (2) automobiles; (3) industrial processes; and, (4) open burning of refuse or farmers' fields. It is commonly estimated that the pollutants from automobiles represent from 40 to 60 percent of the total weight of pollutants on the average, though the products of fuel burning and industrial processes may have greater effects on human health. The balance between these two basic types of pollution varies considerably from community to community, depending upon the amount and types of industry, the use of the automobile for transportation, and the use of steam generating plants to produce power.

Fuel Burning. To control pollution from burning fuel your State will have several options: devices to remove the pollutants from the stack gases at the facility; means of removing pollutants from the fuel before it is burned; alternative methods of operating which require less burning, including other methods of generating power; and, since power plants are one of the main sources of sulfur oxide and particulate matter, generating less power with fossil-fueled generators.

Emission controls, such as electrostatic precipitators and bag-houses for trapping particulate matter, and wet or dry scrubbers for sulfur oxides, will probably be favored by industry and perhaps by your State agency. Industry will probably favor them because, unlike fuel controls, they do not involve indefinite long-term costs – once the initial capital outlay has been made, the costs are minimal. State agencies may favor them because they are familiar, and will cause little or no conflict of authority with other State agencies.

With respect to sulfur oxides, the most effective technology is the use of low sulfur fuel – low sulfur oil, natural gas, or gasified coal. Industry may object to this method because it is simple, effective, and requires spending money indefinitely which cannot be recouped by depreciation of equipment against taxes.

Unfortunately, low sulfur fuel is in short supply now. Little low sulfur fuel oil is now being imported from North Africa, one of the few places it occurs naturally. Fuel desulfurizing plants are being built for American and South American oils, but these are not now producing large quantities of high quality fuel. Low sulfur coal occurs naturally in the American West, but it is only now beginning to be mined. Sulfur and particulate matter can be virtually eliminated from high sulfur eastern coal by gasification, which produces what amounts to natural gas, but the first large-scale gasification plans are only

beginning to be built. Natural gas, the least polluting natural fuel, is in increasingly short supply.

Despite these facts, you should, we feel, press your State agency for phased fuel content controls, which require gradually decreasing pollutant content over a period of several years. They are reliable, certain, and easy to enforce. Most important, new means of producing low polluting fuel will not be developed without demand from industry, and the demand will only be created by tight State fuel content regulations.

Incidentally, do not be mislead by the timorousness of EPA's Guidelines on this point. Section 110(a)(2)(B) of the Act clearly requires, where necessary, that States use "such other measures as may be necessary to insure attainment and maintenance of . . . primary or secondary standard[s]," and the Senate Report makes it clear that Congress had fuel sulfur content controls in mind when it used this phrase:

> "Fuel policies must be developed to provide for the use of clean fuels in urban areas .... Greater use of natural gas for electric power generation may be required. And, to the extent that low sulfur coal and oil are available, they may be required for generating stations and home heating units in critical areas. Fuel import policies may need to be reevaluated."[9]

Never forget, however, that neither stack gas emission controls nor fuel controls will solve the pollution problem. All burning, no matter what the fuel, produces nitrogen oxides and hydrocarbons, and these are pollutants also. Present methods of producing and transporting oil endanger the earth's waters; strip mining of coal defaces the earth; deep mining endangers the health of miners. Even nuclear energy, sometimes proposed as a "pollution-free" alternative to fossil fuels, involves very substantial environmental dangers from the indefinite storage of highly radioactive wastes, and from the heat cast into the water by all power plants. Thus you should, wherever possible, seek alternatives which will reduce the need to burn fuel and produce power.

Many facilities – industrial, commercial, educational – could operate with the use of less power if they examined carefully their operating procedures, and many industries could redesign their processes so as to produce less particulate matter or sulfur oxide. NRDC cannot pretend to be expert on the possibilities here, and each industry or facility must be examined individually. You should take an inventory of the major sources of these pollutants in your community, and if at all possible, obtain the services of engineers expert in the processes of the industries in your area.

Though ultimately the implication of such a policy is clearly that there should be a reduction in the material "standard of living," there are many ways to reduce unnecessary use of fuel and waste of energy short of this major change in American life. Some of them are beyond the power of a State agency to direct: for example, a State agency cannot now decree that all power plants should be fitted with magnetohydrodynamics, a method of reducing the waste of energy in power plants, because at the moment this technology is not yet proven. On the other hand, a State can make rules about the use of energy. For example, it can require that all office buildings be built with windows which will open, in order to reduce the demand for energy to air-condition buildings; and it can require the installation of devices in air-conditioned office buildings which would prevent them from being maintained at inordinately low temperatures. It can also make rules which will slow the present meteoric rise in demand for electric energy, such as forbidding utilities to advertise to encourage the use of electricity, or reversing electric companies' rate structures so that larger users pay higher prices per unit of electric energy than smaller users.

State agencies may resist suggestions such as these, because they involve major changes in their thinking and possible conflicts with other State agencies. But such strategies are clearly authorized by the Act, and in areas where control of emissions will not suffice to reach the National Air Quality Standards, they are required. By law, the federal Administrator may not approve a State plan, or grant an extension of time, to a region which has not explored alternatives such as these for controlling pollution. EPA's Guidelines (section 420.11(e)) recognize this aspect of the Act, and provide that the fact that a State agency other than the one charged with air pollution control may have to participate in administering the State's plan is no excuse for failing to explore any means of controlling pollution.

Automobile Emissions. The responsibility for controlling the emission of pollutants from new automobiles has been placed by Congress in the hands of the federal EPA. However, two aspects of this problem have been left with the States: control of emissions from used cars, and control of auto pollution through the use of traffic controls.[10] The possibilities for control of pollution from used cars are covered elsewhere in this Manual (pages 44-5), but a word is in order here about the use of traffic controls.

The Senate Report fleshes out the few words devoted to this method of pollution control given in the Act:

> "The Committee recognizes that during the next several years, the attainment of required ambient air quality in many of the metropolitan regions of this country will be impossible if the control of pollution from moving sources depends solely on emission controls. *The Committee does not intend that these areas be exempt from meeting the standards. Some regions may have to establish new transportation programs and systems combined with traffic control regulations and restrictions* in order to achieve ambient air quality standards for pollution agents associated with moving sources."[11] [Emphasis added]

> "If the Nation is to continue to depend on individual use of motor vehicles, such vehicles must meet high standards. The bill recognizes that a generation – or ten years' production – of motor vehicles will be required to meet the proposed standards. *During that time, as much as seventy-five percent of the traffic may have to be restricted in certain large metropolitan areas* if health standards are to be achieved within the time required by this bill."

> *"Construction of urban highways and freeways may be required to take second place to rapid and mass transit and other public transportation systems."*[12] [Emphasis added]

In simple terms, what this language means is that in many metropolitan regions, where the automobile-related National Standards (i.e. hydrocarbons, carbon monoxide and to some extent nitrogen oxides and photochemical oxidants) cannot be met within the required time through emission controls, the State must adopt other measures, some of which may be quite drastic, to reduce auto pollution. The list of possible measures is legion.

The most controversial, though most effective and ecologically sound, means of reducing automobile pollution are those which discourage the use of the private car. Almost any measure which decreases the inconvenience of using other means of transportation, while increasing that of autos, will tend to produce less automotive traffic. Better (and cheaper) mass transit (by train or bus), special bus lanes on expressways, and special bicycle or bus lanes on city streets will all tend to increase the attractiveness of less polluting forms of travel. The use of automobiles can be discouraged by charging higher tolls on expressways and bridges for cars traveling during rush hours, by parking restrictions, by halting construction of urban expressways, and even by simply returning one-way arterials to two-way operation. More efficient use of autos should also be encouraged by measures such as higher tolls for cars carrying fewer passengers, and institutionalized methods of providing partners for car pools.

Clearly one of the most important measures to consider is the curtailment of highway building in favor of mass transit. Since highways have other important environmental detriments besides pollution, your group may want to press the State hard to include highway building controls, including a ban on the building of urban expressways, in the State plan.

2. *Deciding the State Control Strategy.*

There are four basic steps in formulating the State's control strategy for an air quality region: (1) determining how much the ambient air quality must be improved; (2) deciding what measures must be undertaken to reach the desired air quality; (3) formulating the needed emission limitations and other measures; and, (4) setting compliance schedules for the measures required. You need to understand how these steps will be taken and how polluters, or weak State agencies, might be able to reduce their effectiveness.

[9] *Sen. Rpt.* at 2.

[10] Used cars are covered by Section 209 of the Act; Section 110 provides the authority for the imposition of traffic controls as part of a State implementation plan.

[11] *Sen. Rpt.* at 13.

[12] *Sen. Rpt.* at 2.

Determining how much improvement is necessary. The National Air Quality Standards set the target which all States must reach. Primary Standards must be reached by 1975; Secondary Standards must be reached by a "reasonable" time, to be specified in the State plan. Press for requiring the State to reach the Secondary Standards as soon as possible – in some cases the equipment polluters must install, or the other measures they must undertake in order for a region to reach the Primary Standards, will allow it to meet the Secondary Standards as well, and in such cases, a "reasonable" time would be 1975. The Guidelines require States to meet Secondary Standards by this time unless they can show why they cannot.

To determine how much improvement is necessary to reach the Standards, the State must determine how polluted the air presently is. In some regions, measurements already exist, but in most they do not. For this reason, Appendix A of the Guidelines provides a formula for estimating the present concentrations of pollutants, which is based primarily on the physical size of the region and the size of its population. Polluters may well try to attack this method of estimation, claiming that it is unfair to force them to place expensive controls on their plants based on nothing more than an educated guess about the need for such measures. But this procedure is entirely consistent with the Act. Throughout the Senate's deliberations on the Act, Senators expressed their dissatisfaction that the lack of precise knowledge had been used to blunt the attack on air pollution authorized in the 1967 Act. Section 109 of the Act reflects this feeling when it requires the National Air Quality Standards to include "a margin of safety" and to protect against any "known or anticipated adverse effects" of air pollution. The Senate Report says:

> "The Committee is aware that there are many gaps in the available scientific knowledge of the welfare and other environmental effects of air pollution agents. . . . [T]he Committee expects that the [Agency] will intensify research on environmental and other economic effects of air pollution ....In the meantime, the [Administrator] will be expected to establish such national goals on the basis of the best information available to him".[13] [Emphasis added]

In short, you can argue Congress foresaw that precise data on air pollution would often not be available, and did not want this to stand in the way of effective and rapid abatement of present pollution.

Deciding what measures must be undertaken to reach the desired air quality. Once the State has decided how much reduction in pollution will be necessary, the next step is to decide how it will be achieved. This involves two questions: (1) what blend of measures – emission controls, fuel sulfur content regulation, traffic control, limitation of highway building, mass transit, bus lanes, etc. – the State will adopt, and what reductions will be required from each individual source, in particular "stationary sources" (primarily industrial facilities and power plants) in order to attain the required reduction.

The variety of choices available for the first decision have been suggested above. In deciding among them, you should keep in mind that these choices are probably the most important ones of the control strategy, which will in the long run heavily determine whether the State can maintain healthful and pleasant air quality. Keep in mind several considerations:

–Some of the measures other than emission control devices, such as control of growth in fossil-fueled power production and automobile traffic, hold much greater promise for long-term abatement. Continued uncontrolled growth of either will soon outstrip our ability to control through emission control devices.

–The more ecologically sound measures will have long-term educational effects, showing people that long-term control of air pollution will require readjusting our present way of living, rather than merely a few technological changes for industrial sources.

–Traffic control is probably a much less regressive measure to control used automobile pollution than requiring back-fitting of emission control devices. The cost of back-fitting will surely fall heavily on the least affluent, who tend to own used cars, while in all likelihood the inconvenience of limiting auto access to central cities will tend to fall most heavily on the more affluent.

–Some of the more drastic measures may have much greater social benefits than the less drastic ones. Reducing the time spent commuting, for example, through control of land use, would reduce the harmful wear and tear on commuters, and better land use and mass transit would reduce the destruction of city and suburban neighborhoods now accompanying the building of many superhighways.

–Emission controls are likely to be more easily obtainable from State agencies than other measures. State agencies are used to administering controls on individual sources, and will probably shy away from measures which might involve them in controversies with the usually potent highway and power agencies of the State.

Formulating the needed emission limitations. Deciding what emissions limitations will be necessary for stationary sources will be difficult, and will provoke tremendous pressures from industry for concessions. You need to know the basic principles which can be used for making these decisions in order to understand the assumptions underlying the techniques used to fill in the details of the decision.

Think of the air in your region as a limited resource. The Congressional decision to clean the air amounts to a decision to take some of this resource out of commercial use. The question then becomes to find an equitable principle for deciding who shall have to give up his free use of part of this resource, with consequent increased costs. Remember industry has no "right" to use the air for free. Polluters often talk as if to make them clean up will somehow infringe on their rights, but this is most emphatically not true. If your thinking always starts from this position, you will find it much easier to deal with polluters' arguments.

There are basically two ways for allocating the "air resources" of a region.[14] This oversimplifies, and you will often find them both in proposed control strategies, but you should be clear about the basic principles in order to understand State proposals.

A theoretically simple method is merely to require each polluter to reduce his emissions by the fraction required for the region as a whole, regardless of cost. Thus in a region requiring a 40 percent reduction in pollution to meet National Standards, each source would have to reduce by 40 percent. A second method, favored by the Guidelines, would take the costs of control into account. Once the agency decided how much reduction was required, the State would allocate it so as to produce the least overall cost for attaining the Standards. For example, suppose the total reduction required for an area was 40 percent, and firm A could reduce 40 percent for 10 cents per pound of pollutant, while firm B would have to pay 25 cents per pound for the same percentage reduction. If these two firms each produced half the pollution in the area, the lowest overall cost might be attained by having firm A curtail its emissions more than 40 percent, while firm B curtailed by less than 40 percent.[15]

The Guidelines tend to favor this least-cost approach by encouraging consideration of "cost-effectiveness" and "social and economic impact." The Act, while it plainly outlaws considering economic factors in setting the National Air Quality Standards, does not specifically prohibit States from considering the costs of various means of *reaching* the Standards.

There are some good arguments for rejecting

[13] *Sen. Rpt.* at 11.

[14] Another principle, which is used by most aggressive State agencies, might be called "best technology." It is not, except in highly polluted areas where all available control techniques must be used to reach the national Standards, theoretically compatible with the ambient air quality approach to pollution control – though it is likely to be more effective. Under this principle, the agency simply requires each polluter to use the best available means of controlling his pollution.

This principle has obvious advantages in ease of administration and enforcement, and it was essentially adopted by Congress in the federal new source performance standards. But in relatively unpolluted areas it will, if even-handedly enforced, result in control beyond the national Standards. (Thus it is akin to the "non-degradation" principle discussed below.) Since this would produce better quality air, and leave room for future industrial growth within the national Standards, it is obviously to be preferred. It is not, however, required by the Clean Air Amendments except where necessary to "attain and maintain" the national standards.

[15] A variation on this theme might be to require polluters to share equal costs. Once the overall reduction needed was determined, the State would use cost data to decide how much reduction would have to be made by each source to meet the Standards, while each bore equal financial burdens. This approach has very much the same advantages and drawbacks as the least cost approach discussed in the text.

the least cost approach, however. Emission limitations are imposed partly to force companies to "internalize" the costs of pollution, passing them on to the customer so that prices will reflect the true costs, including the environmental ones, of producing products. When all prices reflect true costs, consumers will be able to decide rationally how much environment they are willing to sacrifice for given products.

The least-cost approach prevents these rational choices, because high pollution control costs of some firms are shared by firms whose pollution control costs are lower. To the extent that the object of State emissions limitations is to facilitate rational choices among products according to their true cost, then, the equal reduction approach is preferable.

It may be preferable for legal reasons, too. The federal Equal Protection Clause requires that each State deal even-handedly with its citizens. Though it is not likely that a constitutional challenge to either approach would be successful, the equal reductions approach, since it apportions to each polluter the costs of cleaning up his own emissions, may be less open to attack.

Remember, no matter what method is chosen, emission limitations and other measures must be sufficiently strict to assure that the Standards, once attained, can be maintained indefinitely. If further industrial growth in an area would threaten maintenance of the Standards, it must be prohibited. The Senate Report is very explicit on this point:

> "In air quality control regions where present air quality is below the standard, rigorous restrictions must be placed on existing sources to provide a margin for future growth, or only pollution-free growth, development and expansion will be possible".[16]

The variations in pollutant concentrations and meteorological conditions within AQCR's will introduce additional variables into the choice of approaches. The Guidelines encourage States to take both these factors into account in setting emission limitations. Where concentrations are below or above the average of the AQCR, or more quickly or slowly dispersed, emission limitations can be correspondingly less or more stringent.

The Guidelines' suggestion to consider variations in the concentrations of pollutants throughout regions (section 420.2(g)) may in some instances run afoul of the Act's mandate, also. If emission standards are more stringent in the suburbs than in cities, polluting industries will be encouraged to move. In some cases, such moves would encourage greater suburbanization, reducing the feasibility of mass transit and increasing pollution caused by the use of private cars for commuting. Varying limitations within a region might also be counter-productive. Where industries move in order to take advantage of less stringent emissions controls, the controls might only have to be tightened later in order to account for the influx of new sources. Thus the "social and economic impact" of varying limitations might be much more detrimental than simply imposing uniform emission limitations throughout a region.

Finally, varying emission limitations within an area may often contravene the Congress' policy of non-degradation. The Senate Committee's statement of this policy, quoted below, says that in *areas* where present air quality is above-Standard, further degradation shall not be allowed to occur. It does not limit this statement to *regions* with above-Standard air, and thus it must be presumed that the policy has the same force for areas within regions which have high quality air.

Non-Degradation. The battle over the question of "non-degradation" has been one of the hottest one in air pollution legislation and administration. It has been fought out in Congress, where the principle appears to have been largely accepted; and again in the EPA, where the principle appears to have been rejected. You will have a chance to fight the battle anew at the State level.

Basically, the principle of non-degradation is simple, but it has extensive ramifications for the theory of controlling air pollution. Non-degradation means, simply, that in areas of the country where the air is presently purer than the National Primary and Secondary Standards, no further deterioration (or as little as humanly possible) should be allowed. A great deal of energy has been expended between those who support this position and those who support the more "practical" rational economic theory of the use of "air resources."

The conflict can be briefly described. Those who favor the "air resources" view take the position that air, like any other natural resource, exists to be used. To the extent that the air can can be used as a free dump for the effluent of civilization, it reduces the costs of production and therefore brings happiness to people at a lower cost. Of course, we and other creatures must breathe the air, so there is a limit to how much effluent it can absorb without imposing other costs on us. These limits, at least for the moment, are the National Air Quality Standards. The prescription of those who subscribe to this view, then, is that we should by all means reduce our pollution in the places where it exceeds the National Standards; on the other hand, we should not waste the "air resources" (unpolluted air) we have elsewhere by allowing them to remain purer than the National Standards. In short, we should allow polluting industries to move to presently unpolluted areas, placing controls on them only to the extent necessary to assure that the National Standards are not breached anywhere in the country. This is the sort of reasoning which supports projects such as the Four Corners power plants in the Southwest.

Those who favor "non-degradation," on the other hand, place clean air in a category not unlike that of wilderness: clean air, like wilderness, has value beyond its economic worth, and should therefore not be considered merely an economic asset.[17] Rather than allowing our present supply of "air resources" to be used, they would preserve it as untouched as possible, regardless of the fact that this would impose some additional costs on industry (and ultimately consumers), who would be forced to install the best available technology wherever they chose to locate. In regulations, this philosophy could be expressed two ways: (1) that no further degradation be allowed in presently above-Standard areas; or (as a compromise), that further industrialization of such areas be allowed only if the industries install the best possible pollution control technology (and upgrade this as better technology is developed).

The battle between these two positions was joined in Senate hearings on the 1970 Act, and carried through to the legislation itself. Several Senators expressed their sympathy with the non-degradation view repeatedly during the hearings on the Senate bill,[18] and witnesses, including those from the Department of Health, Education, and Welfare (which at that time – prior to the creation of EPA – would have had jurisdiction over the Act) supported it.[19] The testimony of Secretary Finch contained a clear statement that under the Administration bill, as well as the Muskie bill, the Secretary of HEW (now the Administrator of EPA) would not have been able to approve any State plan which did not provide for maintaining high air quality.[20] Similarly, the Senate's Report on its bill says, in discussing the Section on State implementation plans, that no State implementation plan should be approved by the Secretary

> "which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution – including the use of the best available control technology, industrial processes, and operating practices – and care in the selection of sites for new sources, land use planning and traffic controls – deterioration need not occur".[21]

In our opinion, this statement provides all the authority EPA would need to impose non-degradation of presently above-Standard areas as

[16] *Sen. Rpt.* at 13.

[17] We exaggerage the "wildemess" aspect of their position to simplify the contrast with the "air resources" view. To some considerable extent, one can favor non-degradation out of distrust that the pollutant levels required by the National Standards actually protect public health and welfare with adequate margins for our incomplete knowledge. As mentioned above (page 6) new research has invariably shown adverse effects at lower concentrations, and EPA's National Standards allow very small margins beyond levels at which effects have already been demonstrated. Hence, non-degradation is also the prudent position, even for an advocate of the "air resources" philosophy.

[18] *Sen. Hearings at* 159, 1490.

[19] *Sen. Hearings* at 132, 143-59.

[20] Statement of Secretary Finch, *Sen. Hearings* at 143.

[21] *Sen. Rpt.* at 4.

a requirement of all State implementation plans, despite the lack of explicit mention in the statute itself.[22]

EPA has pursued a zig-zag course with respect to non-degradation. In its National Air Quality Standards, the agency included a statement to the effect that nothing in the Standards should be construed to allow the debasement of the air in areas where it was presently above-Standard. However, when the Agency proposed its Guidelines for State plans, no such statement was included. NRDC and other environmental groups protested this omission, and EPA included a statement in its June 28 draft (see pages 14-17 for a discussion of the history of the Guidelines) virtually identical to the one included in the National Air Quality Standards. This statement was hopelessly muddled in the final Guidelines, which contain the statement that they shall not be construed to

> "encourage a State to adopt . . . a plan which does not provide for the protection and enhancement of air quality so as to promote the public health and welfare and productive capacity." (section 420.2(a))

This language bears the unmistakable imprint of committee writing – the tug-of-war between EPA and OMB described above. The section contains no reference to the preservation of air quality in areas with above-Standard air. The phrase "productive capacity," ambiguous as to whether it refers to the productive capacity of people or the economy, has been added in an obvious attempt to muddy the waters still further. This ambiguity can be clarified by examining the "Purposes" section of the Act, (Section 101(b)(1)), from whence it was unhappily borrowed:

> "The purposes of this title are – (1) to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the *productive capacity of its population* ...." [Our emphasis]

What does all this mean for your State implementation plan? We have suggested that you press your State officials to include non-degradation sections in their implementation plan. State officials are likely to answer your request with the argument that nothing in the Guidelines requires the plan to include non-degradation. As you can see from the above, this statement is a lot more debatable than it might appear at first. As the Guidelines make clear, a State plan may be approved by EPA only if the Administrator "determines that it meets the requirements of the *Act*," (section 420.8), not just the requirements of the Guidelines. Since Congress intended that the quality of the air should not be allowed to deteriorate in any air quality region, any State which fails to adopt non-degradation as a policy in its implementation plan runs the great risk of having its plan rejected, either by the Administrator of EPA, or by a court which reviews his decision. You should be able to argue this point strongly to your State air pollution authorities, and you should make it clear that you will oppose, in court if necessary, any plan which fails to adopt it. Once again, it is important that you confer with State officials during the period while they are considering what will be included in the State plan. A court fight, even if you win it, could be extremely costly and might delay the State plan for some time. Moreover, State officials are far more likely to listen to your arguments while they still have not gone on record as opposing non-degradation.

Compliance Schedules – Large industries cannot install control devices, arrange to buy low-sulfur fuel, or change their processes or energy requirements instantaneously, nor can automobiles be fitted with control devices or inspected, nor traffic patterns or transportation systems altered, overnight. Thus control strategies must, under section 420.15 of the Guidelines, provide "compliance schedules" for "all stationary and mobile sources or categor[ies] of such sources."

These schedules should be the nuts and bolts of pollution control, and for this reason they are another critical point for attack by polluters. Judging by section 420.15, State schedules can take two forms – generalized schedules which require all sources of a given "category" of source (e.g. all used automobiles) to reach a given emission level or install a given device by a given time, or specific schedules applying to individual industrial facilities. Obviously any State plan will have to have some schedules of each type – no State will make individual schedules for each used car. But generally, the more specific your State's compliance schedules are about who must do what by when, the better they will be. Any installation which produces large quantities of pollution should have an individual compliance schedule. Compliance schedules should specify interim dates[23] by which easily observable changes must be made (e.g., an electrostatic precipitator installed on a given boiler, or a bus lane set up on a freeway or arterial), rather than simply specifying reductions in emission levels. Specificity and easy measurement are important because they simplify enforcement. It is much simpler to prove in court the failure to install specified equipment than to prove excessive emissions.

EPA's final Guidelines on compliance schedules contain one highly questionable major concession to industry, which you should be prepared to deal with. Section 420.15(a)(2), added in the Office of Management and Budget "review," can be used by a State to prolong the period for submitting compliance schedules to EPA until mid-February of 1973. If States take advantage of this provision, it will impede enforcement[24] and, as a practical matter, peril the State's ability to meet the National Air Quality Standards in the required time.

You must monitor the State's negotiation of compliance schedules carefully to prevent this. In particular,

> – Push the State to begin setting compliance schedules right away, pointing out that slowness in negotiating them is not an acceptable reason for requesting an extension of time for State compliance with federal Primary Standards, and could result in federal enforcement.
>
> – Make sure the State agency has a rational plan for negotiating compliance schedules. To be sure of attaining National Standards quickly, larger polluters should be controlled first. Point out, if necessary, that the Guidelines require reaching the Standards "as soon as possible" – which means in less than three years if it can be done.
>
> – Increase the public visibility of the negotiations over compliance schedules. Your worst enemy is often the quiet discussion between officials and company executives. Ask for public hearings, with a written record, on each major compliance schedule. Failing that, ask that a representative chosen by environmental groups be allowed to participate in any negotiations.

Despite your actions, the process of negotiating compliance schedules will continue beyond the deadline for submission of implementation plans in many States. You should be prepared to follow up, to make sure the State submits this part of its control strategy as completely and quickly as possible.

Some States are bound to use the lengthened period for submitting compliance schedules as an excuse for inaction. This will be difficult to counter, owing to the Guidelines' solicitude for the practical problems of negotiating schedules.

If the State appears likely to prolong setting compliance schedules, you should ask that it set a timetable of its own, as part of its implementation plan, specifying which compliance schedules remain to be determined and when they are expected to be completed. You could then check progress, and publicize if the State falls behind.

You probably will have little other recourse should your State plan prolong the development of compliance schedules. If you State fails to act at all after receiving federal approval of its stretched-out control strategy, you could address a formal letter to Administrator Ruckelshaus detailing the State's inaction, and asking him to issue an order under Section 113 of the Act compelling the State to get on with setting compliance schedules. If such an order were issued, you would be able to sue to compel action under the citizen suit provision yourself.

However, you are much more likely to obtain redress if you wait until the State fails to submit complete compliance schedules within

[22] The Act itself adopts a close relative of the non-degradation principle in its federal new source performance standards, which require the application of the best available technology to *any* new or modified source, regardless of the ambient air quality in the region in which it is located. Since the new source standards will gradually come to control all sources, Congress can be said to have adopted what amounts to a gradual non-degradation policy in the Act.

[23] Section 420.15(c) of the Guidelines requires interim targets for any compliance schedule which extends to more than 18 months.

[24] For example, if no compliance schedule has been worked out with an industrial plant, it may still be possible to bring suit for violating applicable general emissions limitations. But this will often be more difficult than enforcement actions based on compliance schedules, because a court may be unsympathetic if it knows that a State compliance schedule has not yet been negotiated.

the Guidelines' deadline. Should this occur, you can request the Federal Administrator to disapprove the plan. If EPA approves the plan despite your protests, you can, of course, obtain review of his decision under Section 307(b)(1) (and perhaps under Section 304) in federal court.

Remember that compliance schedules do not apply only to installing industrial equipment. Legally enforceable specific compliance schedules are required for all "stationary and mobile sources or categories of such sources" in the region. Thus your State plan should provide compliance schedules for any fuel sulfur or process changes; alterations in traffic patterns or new tolls on highways; construction or operation of new rail or bus mass transit systems; or measures to reduce the consumption of fuel, power, goods, or the use of the private automobile.

D. ENFORCEMENT

If you convened a group of polluters' lawyers and gave them their choice of which part of the State plan they would most like to write, it would be the enforcement section. Lawyers know that without good enforcement provisions, nothing else in the State plan matters, and they also know that seemingly minor nuances of phrasing can have devastating effects. To counteract polluters' attorneys, you should have your own attorney. This part of the Manual is no substitute, but it will acquaint you with the federal enforcement requirements and opportunities, and give you a basis for reacting to proposed enforcement provisions.

To respond to the enforcement provisions your State agency proposes you need to know some principles for deciding whether a procedure will work or not, and you need to know what is required by the Act and the federal Guidelines. This part deals with the former; and the next with the latter.

1. *What Good Enforcement Provisions Should Include*

The optimum enforcement system is one which has the following basic characteristics:

– It places the costs involved in enforcement, as much as possible, on the polluters rather than the State agency or the citizen enforcer;

– It makes the polluter, not the State agency or the citizen, collect the information which will be needed to establish whether or not he is in compliance with the law;

– It requires that the enforcing agency, or citizen, prove the simplest possible factual case in court;

– It makes the polluter suffer from delayed enforcement proceedings, rather than the agency, the citizen or the public at large;

– It discourages litigation, by encouraging the polluter to use his resources to comply with the law rather than contest it;

– It provides incentives to make citizen enforcement easy and inexpensive.

In air pollution control, one deals for the most part with well-staffed potential violators and with an understaffed enforcement agency. Thus, the basic rule for enforcement mechanisms is to make the polluter bear the costs of enforcement as much as possible. This policy is fair and effective. Enforcement of pollution controls is a cost of engaging in a business which results in pollution, just as pollution abatement is. Enconomists agree that for consumers to make informed choices among products the full costs of pollution control should be included in the operating costs of industries. Since it is the polluter who seeks to use the public air resources, it is also fair to ask that he pay the costs of assuring he does not abuse his privilege.

There are also good practical reasons for having the polluter bear the costs of enforcement. Much of this expense goes to gather information. In many cases the polluter will have to gather the same kind of information in order to abate anyway, and requiring him to make this information available to enforcement authorities will add little to his clean-up costs. Since he knows his plant better than State control officials, he can also gather it at the least overall cost.

Putting the cost of enforcement on the polluter has a further advantage. It will increase the incentive to clean up voluntarily, since it allows State enforcement agencies to undertake more enforcement actions. By increasing the liklihood of enforcement, it deters the obstruction which industries have sometimes used in the past to stave off the day of reckoning.

There are three basic costs of enforcement: the cost of gathering the information to establish violations; the cost of proving the violation in court or before an administrative agency; and the cost of delays while a court or the judicial arm of the agency decides whether a violation has occurred. The costs of gathering information may include the costs of operating surveillance systems and testing, and the legal costs involved

in forcing a stubborn polluter to reveal information he has collected. The costs of proving a violation are the legal fees and salaries that must be paid to attorneys and experts and the litigation costs of filing fees, printing, and so forth. The costs of delay are more subtle. If a polluter need not suspend or curtail his operations during the period while an enforcement action is pending against him, the public continues to bear the costs of breathing polluted air; but if temporary abatement is required as soon as enforcement procedures start, the polluter pays the costs of delay in terms of lost production.

All these costs are interrelated. If complex or unavailable facts must be established in order to prove a violation in court, the costs of gathering information and of proving the case both rise and they may be so high that an agency can undertake little or no enforcement. If the cost of delay rests with the State or the citizens – i.e., if temporary abatement cannot be obtained – the polluter will often use legal procedures to frustrate attempts to obtain facts he already has or could readily produce. If you have been interested in air pollution long, you probably have seen repeated instances of all these.

The best enforcement system is one that must be used least. Enforcement costs are essentially wasted costs. The money spent bringing cases to court and obtaining orders to force polluters to clean up, and the money spent by polluters defending such suits, is not spent to abate pollution. Thus a good enforcement scheme should include a considerable deterrent – polluters should realize that if they fail to abate voluntarily, they can expect to be hied into court soon and forced to spend money to defend the suit, as well as to clean up. Deterrence is related to the cost of enforcement actions – the less the cost per action, the more enforcement proceedings can be brought. It is also related to the number of enforcers available. If more money is provided to hire more attorneys for the enforcement department of the State agency or more State Assistant Attorneys General to prosecute pollution suits, or if citizens have the right to bring enforcement actions on their own, more actions can be undertaken.

An enforcement system which requires polluters to gather information in a form which can readily be used for enforcement will aid citizens' ability to force compliance as well as that of State agencies. Similarly, when the issues to be proved in court are simple, citizens are much more able to mount the resources necessary to bring compliance actions. Further incentives for citizen enforcement which you should, if possible, obtain, are provisions for courts to award lawyer's fees, litigation costs, and a percentage of fines to successful, or meritorious, though unsuccessful, citizen plaintiffs (see pages 66-7).

2. *Requirements of the Act and Guidelines*

The Clean Air Amendments and EPA's Guidelines require States to adopt relatively good enforcement systems. The federal law regarding enforcement is contained in numerous provisions of the Guidelines and Act. In order to understand it fully, there is no substitute for reading all the provisions carefully. Here, we can give only a general discussion of where this law meets the requirements of a good enforcement scheme and where you can suggest improvements.[25]

Collection of information. – Under Section 110 of the Act, State plans must require source owners to install monitoring equipment, as well as provisions for State monitoring systems. Sections 420.18 and 420.19 carry out this mandate, requiring State plans to include "enforceable procedures" forcing owners to maintain records and make periodic reports, and new sources to submit information on the emissions they will cause.

Also, under Section 114 the federal Administrator can require polluters to make public any information they collect which will help to develop an implementation plan or determine whether a source is violating any requirement of a plan. The Act and Guidelines require information "reported" by source owners or "otherwise obtained" by the State agency to be made public. In addition, should the State or a citizen sue a polluter for violating an emission limitation or schedule of compliance, the background records used to produce the company's reports will normally be obtainable by legal "discovery" procedures.

A State could comply with these sections without forcing much disclosure or record-keeping, however. To make maximum use of this part of the Guidelines, press your State agency to require continuous monitoring of sulfur oxides, nitrogen oxides, and particulate emissions. This is feasible, and was actually recommended in EPA's June 28 draft of Appendix B. (See pages 64-5.) To be sure these data are available to the public, you should also seek to have your

State plan require source-owners to submit continuous monitoring records as part of their reports. The importance of such rules cannot be overestimated. If you can obtain them, you will have made it possible for citizens and the State to bring successful enforcement actions easily and cheaply. You may even reduce the need to bring enforcement actions, since tremendous public pressure can be brought to bear by newspaper reports based on these continuous monitoring data. Requiring submission of such records also increases the difficulty of falsifying reports.

Factual case. – The Clean Air Amendments have made long strides towards reducing the burden of enforcement actions brought by the State agency or the citizen. Under the common law doctrine of nuisance (still existing in most States), an enforcement agency or citizen often had to prove that it was technically feasible, or economical, for the polluter to clean up; and some State pollution statutes previously required the enforcer to demonstrate the effect of the emissions from a source on the ambient air quality of a region before the court would require abatement. Either of these rules gave the polluter many avenues of escape, and often placed insurmountable burdens on the enforcement agency. Under the 1970 Act, the enforcer's task is much easier; he need only prove that the polluter is violating an applicable emission limitation (which should include schedules of compliance in order to get a court order (injunction) requiring abatement. Thus you need not, under normal circumstances, worry about what must be proven in court under the new Act. You need only be sure that the State does not try to tack additional provisions onto those provided by the Act which would make proving a violation more difficult. For example, a State cannot, in an acceptable implementation plan, require proof of the economic or technological feasibility of abatement, nor can it ask the enforcer to demonstrate the effect of the polluter's emissions on ambient air quality.

Who suffers from delay. – Neither the Act nor the Guidelines contain provisions which would place the cost of delaying enforcement on the polluter. The Guidelines require that the State demonstrate its legal authority to enforce applicable laws and seek injunctions against existing sources, and to "prevent the construction, modification, or operation" of any source where its emissions would threaten the State's ability to attain or maintain any National Standard. Section 420.18 of the Guidelines also requires an implementation plan to include means of disapproving a proposed new or modified source if it will result in either a threat to attaining and maintaining a National Standard or a violation of the applicable portions of a State implementation plan.

But these provisions do not require the kind of enforcement system you need to force the polluter to pay the cost of delaying tactics. You may wish to push your State agency for other measures to accomplish this: a permit system, provision for abatement orders, administrative compliance orders issued by the air pollution agency, preliminary injunctions, scaled fines related to the quantity of illegal pollution, or pollution taxes.

EPA's June 28 draft of its Guidelines would have required a permit system for existing sources, and new or modified sources. OMB's "review" eliminated this requirement, leaving only a requirement (section 420.18) that polluters must demonstrate new or modified sources will not threaten attainment of National Air Quality Standards. But the Guidelines still *allow* permit systems. We recommend that you push for including a permit system of the type suggested on pages 62-4). Permit systems can be designed so that the polluter must reveal a great deal about the type and quantity of his emissions, and agree to place himself on a step-by-step schedule for compliance, before he will be allowed to continue operating. A good permit system will also require that the information revealed in the permit application be made public, so that citizens and newspapers will have a chance to determine who the major polluters in the region are[26] Usually a permit system will give a period of grace during which polluters are allowed to apply for the permits and have them processed. EPA's June 28 draft Guidelines limited this time to six months; our model regulation suggests setting phased schedules for obtaining permits, starting with the largest polluters. This should prevent the agency from being swamped with applications, ensuring scrutiny of each application in a rational order. Once the period for applying has passed, the polluter should be subject to stiff civil penalties for operating without a permit. Enforcement of a permit requirement is simple and cheap, since the State can obtain an injunction or fine merely by showing that the facility does not have a valid permit.

You should also seek provisions for administrative compliance orders, or preliminary injunctions as means of shifting the cost of delay onto the polluter. Compliance orders allow the enforcement arm of the air pollution control agency to close a plant or curtail its operations during the period while the agency or a court determines whether the company is complying with the State's emission limitations. Roughly equivalent orders, when obtained in court, are called preliminary injunctions. In some States, the State pollution control agency can already obtain preliminary injunctions, though often with difficulty. Ordinarily courts may grant preliminary injunctions only when the party asking for

[25] The following outline can help you locate the enforcement provisions with respect to each type of pollution control mandated by the Act, and serve as a reference when you want to deal with specific aspects of enforcement.

1. State enforcement against stationary sources:
   a. *Presently existing sources:* section 420.11(a) (2) of the Guidelines; Sections 110, 115 and 116 of the Act.
   b. *New and Modified Sources:* section 420.11(a) (4) of the Guidelines; Sections 110(a) (2) (D), 111(c) (d), and 114(b) (1) of the Act.
   c. *Monitoring:* sections 420.11(a) (5) (6), 420.18(b) & (c), and 420.19(a) (1) & (3) of the Guidelines; Sections 110(a) (2) (C) (F) and 114(a) & (b) (1) of the Act.
   d. *Public availability of data collected by source owners or State:* sections 420.10(e), 420.7(a) & (b), 420.19(a) (1), and 420.18(b) of the Guidelines; Section 114(a), (b) & (c) of the Act.
2. *State enforcement against used car pollution:* section 420.11(b) of the Guidelines; Sections 110(a) (2) (G), 209(c), and 16 of the Act.
3. *State enforcement of emergency episode provisions:* sections 420.11(a) (3), App L, 1.5.3.(e) of the Guidelines; Sections 110(a) (2) (F) (v), 114(a) & (b) (1), and 303 of the Act.
4. *Federal enforcement against stationary sources:*
   a. *Presently existing sources:* Sections 113, 115 of the Act.
   b. *New and modified sources:* Sections 111(c) (2), 113, 115 of the Act.
   c. *Monitoring:* Section 114 of the Act.
   d. *Public availability of data:* Section 114(c) of the Act.
5. *Federal enforcement against auto pollution:*
   a. *Monitoring:* Sections 206, 207, 208, 211(c) (3) & (d) of the Act.
   b. *Enforcement:* Sections 204, 205, 207(b) (1) & (2) of the Act.
6. *Federal enforcement in emergency episodes:* Section 303 of the Act.
7. *Citizen enforcement of State and federal emissions limitations, schedules for compliance and war provisions:* Sections 304, 307(b) (1) of the Act.

[26] Industry will almost always oppose such a provision on the ground that what they emit is proprietary information, which might help their competition. This claim is usually false, since few industrial processes are secret from others in the same industry. State regulations can handle this sort of claim by requiring any polluter to reveal the information unless he can make a satisfactory showing to the State agency, or better yet a court, that the information should be entitled to protection as a "trade secret". This subjects the polluters claim to scrutiny, and puts the burden of withholding information on him. "Trade secret" is also a narrower and better defined legal category. Since "trade secret" and "proprietary" are terms of art, you would be well advised to have an attorney handle discussions with your State agency about this problem.

them can show he will probably win the ultimate law suit. Few States now grant the air pollution control authority the right to make immediately effective compliance orders though the Act gives such powers to the federal Administrator. Model State provisions for both these kinds of authority are contained on pages 66-7.

Sliding scale fines may also deter polluters who might otherwise prolong non-compliance. Large polluters, whose cleanup costs will be great, must be subject to fines large enough to encourage them to comply rather than pay. Thus the size of fines should be related to the quantity of illegal pollutant emitted, rather than limited by fixed maxima as most State and federal fines now are. If a large polluter knows that his fine will be so many cents per illegal pound of pollutant emitted per day, his incentives to clean up will be similar to that of smaller source-owners. The amount of the fine per pound should be more than the cost of cleaning up the pollutant, to provide an economic incentive to induce compliance. An example of a fine regulation of this sort appear on pages 66-7.

Further economic incentives to prevent foot-dragging can be engineered into the fine structure by providing for increasing the unit cost of fines as time passes. If, for example, a fine of 15 cents per pound of sulfur dioxide emitted above the applicable emission limitations can be assessed during the first year of operation of a State plan, this figure might be increased to 20 cents per pound during the second year, and 25 cents per pound the third and subsequent years. Since the cost of abating sulfur dioxide pollution is often estimated to be about 15 cents per pound, this fine structure would provide strong economic incentives for polluters to comply with the emission limitations.

We should stress here that fines scaled to quantities of pollutants emitted are wholly compatible with the basic idea of carefully worked-out compliance schedules which the Act and the Guidelines require. No fines would be assessed for emissions which did not exceed the provisions of the applicable compliance schedule. Since the compliance schedules would take into account each polluter's problems in installing controls, scaled fines would only penalize polluters who failed to live up to realistic obligations.

Scaled fines are, however, somewhat clumsy. They cannot be effective unless polluters are required to keep continuous emission records, since the enforcer will have to prove to a court how much pollutant the facility has emitted in order to have a court assess the fine. This increases the costs of data gathering and proving a case. To be safe, a sliding fine scale should be accompanied by a set minimum per month of violation to preclude the ludicrous possibility of a court finding a polluter in violation but not assessing a fine because the State cannot prove the exact amount of the illegal emissions. The model State fine provision on pages 66-7 of the Manual shows how such a provision might be written.

Finally, the costs of delay can be shifted extremely effectively by imposing a pollution tax set at a level high enough to induce companies to reduce emissions as quickly as possible. A tax differs from a sliding scale fine in two respects: it applies without a judicial finding that excess emissions have occurred; and it usually taxes all pollution, whether or not above emission limitations. (Taxes could, of course, be written to apply only to emissions in excess of emission limitations, but this is usually not proposed.) Taxes present many of the same problems as scaled fines. First, the level of the tax must be set so that the cost of non-compliance is greater than the costs of cleaning up. Second, someone must inspect the source or keep continuous emission records so the source owner can be assessed the correct amount of tax. (This problem can be simplified somewhat for sulfur oxides, since a more easily administered tax on the sulfur content of fuels, collected at fuel supply sources, can be substituted for an emissions tax.)

Discouraging litigation. – Much of what has been said above suggests how to discourage litigation. In general, any provision which increases the chance of enforcement action against an obstinate polluter, or any provision which tends to increase the costs of defending or losing an enforcement suit, increases the incentive to avoid litigation.

The Act and the Guidelines contain several significant deterrents to non-compliance. Sections 113 and 114 of the Act allow the federal EPA to issue abatement orders and even take over enforcement of an entire State plan if the State fails to enforce it, and provide the Administrator of EPA with the tools he needs to carry this authority out. Section 303 allows EPA to enforce State emergency plans. The citizen suit provision, Section 304, may be even more important, since it gives citizens the right to seek injunctions against polluters who fail to comply with State emission limitations, and gives the federal courts the power to award litigation costs and attorneys' fees whether or not they succeed. The value of Section 304 cannot be overestimated, since it means that even polluters with enough political muscle to hamper State enforcement are no longer safe from effective enforcement. NRDC is preparing analyses of this provision for laymen and attorneys.

A strong citizen suit provision, which *requires* the State courts to award litigation costs and attorneys' fees to any citizen who brings a successful suit, would be a valuable addition. So would a provision allowing (or requiring) courts to award a portion of fines to successful citizen plaintiffs. Such provisions can, of course, only be added to a State plan where State law presently grants, or can be changed to grant, citizens the right to sue on State emission limitations. Any such provision should also make it clear that citizens may sue their State government for failure to comply with any requirement of the implementation plan.

Fines versus criminal penalities – Citizens favoring the most stringent control of air pollution are often tempted to favor the use of criminal rather than civil penalties against polluters who fail to abide by emission controls. This is understandable, since most concerned citizens consider someone who fails to clean up his plant morally reprehensible. Criminal penalties may not be the most effective means of accomplishing control, however, since judges are often reluctant to brand an offender a criminal for conduct which until quite recently was considered perfectly normal.

We feel that effective enforcement is more likely if criminal and civil penalties are combined in a somewhat different way. Penalties for violating an emission standard or schedule of compliance, we feel, should be strictly civil – that is, strictly fines and injunctions. Rather than seeking to have your State plan include criminal penalties for violations, you would better spend your energies making sure that civil fines for large-scale pollution are commensurate with the amount of pollution and/or the length of time it has occurred.

Criminal penalties should be reserved to enforce the strict reporting and record-keeping requirements which are the backbone of successful enforcement. The State plan should require that the President of a company, or Vice President reporting directly to the President, or the highest corporate executive located in the State, sign the documents submitted to the State and certify by his signature that the information submitted is true. (Do not allow this statement to require the officer to certify that the information is "true to the best of his knowledge," or some like phrase, since this will allow him to escape prosecution by later claiming ignorance that the information was false.) Stiff criminal penalties – fines of perhaps $10,000 and/or jail sentences of six months to two years – should be provided for failing to maintain or report the required records or for false statements contained in the reports and records. The plan should provide that officers are personally liable for falsehoods submitted to the agency, and may not be reimbursed their fines by their company.

Criminal penalties for lying – as opposed to polluting – are common in the law, and judges usually do not hesitate to enforce them. (For example, federal judges regularly impose criminal penalties on offenders who falsify stock statements or violate the reporting requirements of the Securities and Exchange Act.) Better yet, such provisions are usually self-executing. Corporate executives who might take chances with the possibility of having their company pay a fine will seldom risk the disgrace and cost of a criminal penalty applied to them personally. Thus such a provision goes a long way towards assuring that a high corporate executive will personally supervise corporate record-keeping and reporting to be sure that the records and reports are truthful.

State agencies have full authority under the federal Guidelines to promulgate rules such as these. Sections 420.18 and 420.19 of the Guidelines require State plans to provide "legally enforceable" procedures to require polluters to implement the State's authority to disapprove the construction, modification, and operation of new sources which will "prevent the attainment or maintenance of a national standard," and to require source owners to "maintain records of, and periodically report . . . information on the nature and amount, of emissions . . . ." Thus you should not hesitate to press your State to adopt criminal penalties for failing to maintain records or report, or for maintaining or reporting false records.

Enforcement against automobile pollution. It is much more difficult to develop workable enforcement provisions for emission controls from automobiles than from stationary sources, because there are so many more polluting units. No satisfactory inexpensive and quick method

has yet been developed for determining whether automobile emissions are within the legal limits, even as part of an existing State-required safety inspection. At present, it is only practical to determine whether the required pollution control equipment is installed and functioning properly, and to determine whether the car emits visible smoke (unburned hydrocarbons) from the tailpipe. (See pages 44-5 for discussion of inspections.) "No standing" and "no idling" rules, which have been imposed in some jurisdictions to reduce hydrocarbon and carbon monoxide emissions, are also difficult and expensive to enforce.

More drastic methods of coping with automobile pollution are much easier to enforce (a point, in addition to their greater long-term effectiveness, in their favor). It is relatively easy to enforce pollution control tolls imposed on major access highways into an urban area. For example, it is simple for a toll collector to assess tolls related to the number of passengers per vehicle, or related to whether the vehicle passes through the toll gates during rush hour. (If the major access routes to a city are not toll roads, of course, this method of control will have little utility. But most cities of any size are now serviced by some sort of limited access highway used by commuters to come to work.) In the Guidelines, EPA has promised future guidelines for traffic control measures along with estimates of their effectiveness.

Similarly, no enforcement problems are presented by methods of control such as special bus lanes on highways, construction of new mass transit facilities, or bans on the construction of new urban expressways.

E. AIR QUALITY SURVEILLANCE

1. *Air Quality Surveillance*

An air quality surveillance network consists of a series of sampling devices located throughout an air quality control region, and the laboratory, communications and other resources needed to collect and analyze sampling data and maintain the sampling devices. Surveillance networks are necessary to judge progress made toward compliance with ambient Standards, to provide data to develop and modify control measures, and to activate emergency control procedures during air pollution episodes.

Section 110(a)(2)(C) of the Act requires that an implementation plan include "provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor, compile, and analyze data on ambient air quality...."

Section 420.17 of the Guidelines sets specific requirements for surveillance networks. These include highly detailed specifications of numbers of monitoring sites, types of sampling methods and frequency of sampling, a requirement that at least one sampling site be located in the "area of estimated maximum pollutant concentrations," and a requirement that the plan describe the existing and planned surveillance system in detail. The plan must demonstrate that those elements of the surveillance system needed for emergency episodes will be operating one year after the plan is approved. The rest of the system must be functioning one year later.

EPA has recently published an excellent, short pamphlet on surveillance networks that can be ordered free by non-profit organizations.[27] This pamphlet and the specifications in the Guidelines say a great deal about what an acceptable surveillance network should include. We have a few additional comments.

Make sure that your proposed implementation plan contains a detailed description of the surveillance network. If this description is thorough enough, you will be able to tell a lot about the proposed network – even without technical help – simply by comparing the description with the specifications in the Guidelines.

Make sure also that the plan includes definite schedules for complying with the one- and two-year deadlines for operating networks.

The specifications in the Guidelines for minimum required numbers of sampling sites are set according to population: the more people, the more sites required. This fails to take land area into account. Where many people live in a relatively small area, fewer samplers may be necessary than when the same number of people live in a larger land area. The Act requires that all persons' health be protected. Make sure that the network in your region provides samplers to test the air in every part of the region, including low-population areas.

The most contentious aspect of the surveillance network will probably be the location of the sampling devices. The Guidelines require only that one sampling site must be located in the maximum-pollution area, but the EPA pamphlet gives more thorough advice. Make sure the samplers in your area are located so as to give as representative samples as possible of a community's air.

2. *Emission Source Monitoring*

One of the key elements in the implementation plan is the procedure for monitoring compliance with the requirements of the control strategy. Close attention will be necessary to be sure that these procedures provide the State agency and citizens easy access to the detailed emission data they need to bring quick, effective enforcement actions.

Section 110(a)(2)(F) of the Act requires that State implementation plans have legal authority and provisions for:

> – stationary sources to install equipment to monitor their emissions;
>
> – periodic reports on monitored emissions; and
>
> – correlation of reported data with applicable emission limitations and public availability of the correlated data.

The Guidelines echo the Act's requirements for State implementation plans:

> – 420.10(e): requirement that reported emission data be publically available, correlated with emission standards;
>
> – 420.11(a)(5) and (6): legal authority to inspect, require monitoring and reporting of emission data, and to make such data public;
>
> – 420.19: requirements for legally enforceable procedures for monitoring and reporting of emission data by source owners, inspection of stationary sources by the State agency, and establishment of a system for monitoring visible emissions and investigating complaints.

In addition, Section 114 of the Act gives the federal Administrator broad authority to:

> – require monitoring and reporting of emissions by sources and submission of whatever other information is requested, and
>
> – enter stationary sources and copy records, inspect monitoring equipment and sample emissions.

Except for information about trade secrets, all reports, data or information the Administrator acquires must be made public. *No* emission data submitted to the federal authorities can be kept from the public, however, and any confidential information can be shared by EPA with other enforcement authorities. Section 420.11(d)(2) of the Guidelines allows the Administrator to delegate his authority under this section to States in order to fulfill their requirements for authority to monitor source compliance.

These are good general requirements, but the rules for States require less than the thorough monitoring procedures that are absolutely essential for effective enforcement of a control strategy. Citizens should press for several items that will help make the monitoring system as airtight as possible. The example regulations on pages 64-5 contain language implementing most of these improvements.

Section 114 provides federal control officials with broader authority than the Guidelines require of State officials. It allows EPA to collect information other than emission data, to inspect any source, and to make all emission data public. Make sure that your State either has similar authority or requests EPA to delegate its authority under Section 114.

Make sure that the plan provides legally enforceable monitoring and reporting requirements for *all* stationary sources. Section 420.19 of the Guidelines states that the stationary sources to which its requirements apply are

> "sources of a class or category which, for the purposes of construction or modification, would be subject to procedures established pursuant to §420.18."

Section 420.18 deals with review of construction of new sources (defined as construction of new stationary sources and modification of ex-

[27] "Guidelines; Air Quality Surveillance Networks," U.S. Environmental Protection Agency, Office of Air Programs Publication No. AP-98. See page 72 for ordering instructions.

isting ones). The new source section of the Act (Section 111) defines stationary sources as "any building, structure, facility, or installation which emits or may emit any air pollutant," and says that standards must eventually be set for all stationary sources that "contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare." If new source standards will eventually be set for all such stationary sources, procedures (under section 420.18) for review of their construction will also be set, and therefore the monitoring and reporting requirements of section 420.19 apply to *all* stationary sources that contribute to air pollution.

Make sure that the regulations in the control plan *require* sources to install monitoring devices, make reports and so on. Don't leave it to the agency's discretion.

Press for continuous monitoring and recordkeeping wherever technically possible. There is no requirement for this in the Act or final Guidelines, but you should argue that it is the only truly effective way to monitor compliance and that it will be a more effective deterrent to noncompliance. The example regulations on pages 64-5 calling for continuous monitoring and recordkeeping for sulfur dioxide, particulate matter, and nitrogen oxides are based directly on recommendations in the Guidelines EPA was ready to publish in June.

The minimum amount of monitoring data pollutors must submit to the State control agency should be set in the regulations. EPA has previously recommended submission of monthly summaries of 24-hour averages of continuous data. This would not be sufficient to tip the agency off to any cheating. A 24-hour average alone could conceal emissions well above standard. Press for more frequent submission of hourly averages of continuous data. Submission of any data is worthless in terms of enforcement unless readings are taken frequently enough to expose non-compliance and make cheating difficult.

Make sure that continuous or other monitoring data must be kept in a form allowing easy inspection, and must be kept on file by the source owner for a specified period of years.

Make sure also that all monitoring data and reports are expressed in the same terms in which the applicable control regulations are expressed. If an emission standard is expressed in terms of weight of emissions per unit of process input (say, 0.20 pounds of particulate matter per 100 pounds of refuse burned in an incinerator), make sure the monitoring data is kept in the same units, not, for example, in terms of weight of emissions per hour.

Most important, make absolutely certain that the implementation plan provides for quick and easy public access to *all* information that any control agency collects. Without such measures, much of the value of the Act's citizen suit provision disappears.

The Guidelines call for including procedures for investigating complaints. Suggest procedures requiring the control agency, upon receipt of a standard form making a complaint or specifying grounds for suspecting non-compliance, to make an inspection, obtain and make public all monitoring data for the period in question, and issue a statement of action on the complaint within a specified time. You might also press for a measure requiring the control agency to obtain and make public hourly averaged monitoring data from a specific source for small periods of time if it receives a formal request from an interested party.

The Guidelines also call for inspection procedures, including a system for monitoring visible emissions. Make sure these procedures appear in the implementation plan and make the best possible use of the control agency's resources.

F. EMERGENCY EPISODE PROCEDURES

Section 303 of the Act gives the Administrator of EPA authority to go to court to restrain any polluter contributing to a severe air pollution problem that endangers human health—that is, to take federal action in an air pollution emergency. Section 110(a)(2)(F)(v) requires that an implementation plan contain comparable authority for the State agency and contingency plans to implement that authority.

Section 420.16 of the Guidelines elaborates on these requirements:

1.) Each air quality control region classified as Priority I or II must submit an emission control plan for emergency episodes which:

- sets criteria (air pollution levels) that define two or more stages (degrees of severity) of an air polluting emergency,
- provides for public announcement when these stages are reached, and
- specifies emission control measures to be taken at each stage of a crisis.

Appendix L of the Guidelines gives EPA's recommendations for criteria for four emergency stages, and emission control actions to be taken at each stage.

2.) For each stationary source emitting 100 tons or more per year, the emergency action plan must contain a "specific legally enforceable emission control action program." If this cannot be submitted as part of the original implementation plan, it must be included in the first semi-annual report made by the State (see section 420.7 of the Guidelines).

3.) An emergency action plan for a Priority I area must also provide for:

- daily acquisition of forecasts of stagnant weather conditions, updated every 12 hours during emergency episodes,
- inspection of sources during an emergency to see that they are complying with the measures of the emergency action plan, and
- communications with public officials, emissions sources, other public agencies and the news media.

4.) If requirements 2 and 3 cannot be met by the time the implementation plan is submitted, the plan must contain a timetable for meeting them one year after submission, and interim emergency measures.

These provisions indicate what you can demand under the Act and Guidelines, but they give only the bare bones of an adequate emergency action plan. When air pollution conditions occur, serious enough to immediately endanger human health, the control agency must put into effect what amounts to an entire implementation plan that will produce the desired abatement in hours or days instead of years. To do this, a plan must be highly detailed and completely prepared in advance, yet flexible in operation. Successful implementation requires coordinated effort from a variety of public agencies and officials and private persons.

The essential elements of an adequate emergency action plan are:

- Sufficient legal authority to create and enforce the plan;
- Basic information about meteorological conditions and ambient air quality, and detailed information about the operation of each emission source in the area;
- An ambient surveillance system based on the regular network, but capable of giving quicker and more frequent readings;
- A system for obtaining more frequent and thorough meteorological information;
- A communications network for dealing with monitoring and weather data, other public agencies, the public and emission sources; and
- The abatement strategy itself, including:
  - air quality levels defining each emergency stage;
  - specific abatement measures for each emergency stage, chosen to respond to the severity of the stage and to prevent the occurrence of the next most severe;
  - inspection procedures adequate to determine quickly whether abatement measures are being carried out; and
  - enforcement procedures allowing the control agency to force quick compliance and including heavy sanctions for non-compliance.

Since writing the main control strategy is already taxing most State agencies, many may choose to delay submitting an emergency action plan until a year from January 30, 1972, and others may submit abatement procedures for specific sources in the first semi-annual report (due for most States by December 31, 1972). Whether or not your State plans a delay, we recommend that you order copies of two EPA publications dealing with emergency action plans as soon as possible.[28] Both are free and give excellent, detailed treatments of the subject. We have only a few additional remarks.

If your State does decide to delay a full year in submitting its emergency plan, make sure that is specifies the best possible interim measures. Also make certain that the public will be able to examine the proposed emergency plan

[28] "Guide for Air Pollution Episode Avoidance," and "Guide for Control of Air Pollution Episodes in Medium-Sized Urban Areas," Office of Air Programs, Environmental Protection Agency, June, 1971. Non-profit organizations can order these publications free, as documents AP-76 and AP-77 respectively, from the address given on page 72.

sometime before it is finally submitted. Do the same for any abatement procedures for specific sources that are submitted in the first semi-annual report.

Appendix L of the Guidelines offers some example regulations of the sort that might be written into an implementation plan to require preparation of "standby plans" for specific sources. These regulations can be improved substantially. All stationary sources (not just those emitting 100 tons or more) should be required to submit an abatement plan as part of an application for a permit to operate. If no permit system is planned, make preparation of abatement plans by source-owners mandatory and allow the State agency to disapprove them and write its own plan for a source if necessary.

G. PROCEDURES FOR REVIEW OF NEW CONSTRUCTION

In Sections 110(a)(2)(D) and 110(a)(4), the Act requires that implementation plans include procedures for agency review of construction of new sources and modification of existing ones. These procedures must require the owner or operator of the source to submit whatever information the agency needs, and must include authority to prevent the construction or modification of any stationary source to which a new source standard will apply if that source would jeopardize attainment of a National Air Quality Standard. "New source standards" are emission standards to be set by EPA periodically over the coming years for categories of sources. (See Section 111 of the Act and page 7.) The Act requires review only of new construction or modification of existing sources that fall into categories for which these Section 111 standards have been set.

Sections 420.11(a)(4) and 420.18 of the Guidelines expand these requirements in several important ways:

– Section 420.18(a) expands the scope of the Act to require that the control agency disapprove any construction or modification that jeopardizes a national standard *or violates any provision of the implementation plan.*

– Section 420.11(a)(4) requires that the State have authority to prevent construction, modification *or operation* of sources jeopardizing attainment of National Air Quality Standards. The same section requires that the States have such authority over *any stationary source*, not just those sources to which Section 111 standards apply.

Section 420.11(a)(4) originally called specifically for authority for a permit system, but that language was dropped in the final version of the Guidelines. Nevertheless, these sections come close to requiring a fairly comprehensive permit system anyway: information on construction of new sources and modification of existing ones, and on operation of all sources must be submitted to the agency, and some kind of agency approval given.

Press for inclusion in the plan of a comprehensive permit system applying to construction and operation of all sources. The main advantage of such a system is that it forces every polluter to demonstrate to the control agency that it has met all requirements and that it will not violate any standard or other regulation. The expense of this demonstration falls largely on the polluter, not the agency, and the demonstration is made uniformly for every polluter, not just where the agency suspects malfeasance. A permit system that covers existing sources also provides uniform and detailed information on the existing pattern of emissions, information the agency would have to gather anyway.

There is good evidence the EPA favors permit systems. In proposed and revised versions of the Guidelines, Appendix B contained example permit regulations. A March, 1971, EPA document recommended a permit system even broader than the one suggested on pages 62-4. The introduction to the final Guidelines gives no reasons why the specific permit system requirement was dropped.

The example control regulation on pages 62-7 includes a comprehensive permit system based heavily on EPA's recommendations. In addition to covering existing as well as new sources, this system

– covers installation of any air pollution control devices;

– calls for use of the best available control technology;

– adds provisions for revisions of the terms of the permit;

– requires that each source have an approved emergency episode plan before the permit is granted.

If you cannot get a permit system incorporating all these features, make sure that the procedures written into the plan meet the minimum requirements of the Guidelines:

– they apply to *operation* as well as construction or modification,

– they apply to *all* stationary sources, and

– they prohibit issuing a permit to a source which will violate *any* measure of the implementation plan.

You might want to go beyond the example regulation and press for measures requiring a detailed, publicly available administrative statement of reasons on all permit decisions.

A really thorough permit system should cover construction of transportation or other facilities that carry or accommodate mobile sources. The most obvious examples are roads, tunnels, garages and other facilities for motor vehicles, or airports and railbeds and railyards.

In conjunction with a permit system, citizens might want to urge adoption of procedures on the State and/or local level like those provided for on the federal level by the National Environmental Policy Act of 1969. NEPA calls, among other things, for each federal agency to establish procedures by which it will file with the Council on Environmental Quality detailed public statements on the environmental impact of any major action. NEPA (reprinted on pages 75-7) could easily be adapted for State use, and would give environmentalists access to a wide range of projects (such as fossil fuel-fired steam generators) that do not involve any major federal agency action.

In pressing for a full-scale permit system, keep in mind the danger of its degenerating into a licensing system for polluters. Presented with large numbers of permit applications to process in a short time, a control agency may be forced to simply distribute permits without adequate examination. This will be particularly true if the agency is underfunded or understaffed to begin with. The agency should establish a schedule for processing permit applications that will allow it to give adequate consideration to each one. Make sure that the permit regulations contain a provision stating that possession of a permit in no way relieves a source from the obligation to comply with all applicable control regulations. If permits are handed out indiscriminately, this provision will prevent polluters from arguing that they cannot be prosecuted for non-compliance simply because they have a permit.

H. PROCEDURES FOR REVISIONS

1. *General Revision Procedures.*

An acceptable plan must contain procedures for its own revision. Changes in the ambient Standards for the six pollutants and development of new ways to control their emission are inevitable over the next few years. Careful attention should be paid to the procedures for revising plans in response to these changes to guarantee full public participation in revision.

Section 110(a)(2)(H) of the Act states that the Administrator must approve a plan if, among other things,

> "it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements."

Section 110(a)(3) requires the Administrator to

> "approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."

(The "requirements of paragraph (2)" are the general requirements – for emission limitations, timetables, emergency procedures, etc. – that any proposed plan must meet to be approved in January.) This means that any revision of a plan must be treated in exactly the same way as a proposed plan was originally – hearings must be held, and the revision must be approved by EPA if it meets the strict requirements of the Act.

What if a State fails to revise its plan? The Act calls for the same action as when a State fails to submit any plan at all, or submits an unacceptable plan. Under Section 110(c), the Administrator must put his own plan or revision of a plan into effect six months later unless the State does what he wants before that.

What constitutes failure to revise a plan? Under sections 420.6(a) and (b) EPA can notify a State that it must revise its plan when a National Air Quality Standard is revised, when better methods of attaining the Standard are developed,

or when the Administrator finds that the existing plan is inadequate. The State must then, within 60 days or some longer period set by the Administrator, revise the plan according to the plan's own revision procedures. If the State fails to do all this, the Administrator must step in. Section 420.6 of the Guidelines elaborates further on the revision requirements of the Act:

> "(c) Revisions of rules and regulations included in an applicable plan shall be adopted after reasonable notice and public hearings... ;
>
> (d) Any revision of rules and regulations and of compliance schedules shall be submitted to the Administrator... within 60 days following its adoption;
>
> (e) Revisions other than those covered by paragraph (b) of this section shall be identified and described in the semi-annual report...."

These paragraphs are in clear violation of the Act. They require only that revisions of rules and regulations be submitted to public hearings by the State. Changes in compliance schedules are not required to go through hearings, and changes in other elements of the plan don't even have to be submitted within the required period for revisions (and, the implication is, will not have to be approved by the Administrator after "reasonable notice and public hearings").

Make sure that the revisions procedures contained in your State's implementation plan follow the requirements of the Act and provide for adequate public notice and hearings on *all* revisions of the plan. Good revision procedures are particularly important because an entire class of variances are required by the Guidelines to be considered revisions of implementation plans. For a discussion of this important point and detailed suggestions for what revisions procedures should include, see pages 55-9.

2. *An Additional Application of the Revision Procedures.*

The revisions procedures of an implementation plan should be extended to apply to two additional elements of a State's air pollution control activities. Sections 111 and 114 of the Act give the Administrator of EPA responsibility to set and enforce emission standards for newly constructed sources of pollution (Section 111) and broad authority to monitor compliance with these standards and with the provisions of State implementation plans (Section 114). Each of these Sections contain a paragraph saying that any State may submit a plan for performing the duties described in the Section, and that the Administrator may approve the plan and delegate his authority under the Section to the State.

EPA will be likely to delegate its authority under these provisions, since federal enforcement is difficult and the agency is already overburdened. Once delegated, moreover, each of these important blocks of authority is likely to stay in State hands. Though each Section contains a statement that delegation of his authority in no way prevents the Administrator from performing the duties described, once the authority is delegated it is less likely that EPA will step in except in emergencies or cases of blatant State failures to fulfill their responsibility.

If authority under these sections does fall to the State, it is important to ensure that the State must follow adequate procedures to carry out the authority. With one possible exception, the Act and Guidelines provide for no public access to the plans States submit under Sections 111 and 114. It should be possible, however, to consider these plans revisions of the existing implementation plan and deal with them as such.

Section 114 is the one case where citizens may have a hand in a State request for delegation of federal authority. A State may submit, along with its original implementation plan, a request that the Administrator delegate to the State his monitoring authority under Section 114 of the Act.

If a State makes such a request, its implementation plan should spell out how it plans to carry out its monitoring authority. Along with the rest of the plan, this request would be subject to public scrutiny at the hearings.

It is possible, however, that a State might submit a separate monitoring plan after the original implementation plan had been approved. Since the original plan would have contained some kind of monitoring procedures, the new monitoring scheme would revise rules and regulations in the original plan, and therefore would have to be considered at public hearings before submission to the Administrator. Make sure that the revision procedures written into the original implementation plan state specifically that submission of a request for delegation of authority under Section 114 constitutes a revision of the plan that must be given public hearing under section 420.6 of the Guidelines.

Do the same thing for Section 111. States are already required, as part of their control strategy against the six major pollutant types, to set emission limitations on specific sources

in order to meet the National Air Quality Standards. Section 111 requires the federal government to go beyond these limitations and set uniform national emission limitations for whole categories of sources. These limitations will often be tougher than the specific emission limitations set under a State implementation plan, and they will apply to other kinds of pollutants than the six for which National Air Quality Standards have been set. If a State applies to take on responsibility for enforcing these standards, however, there is no provision for the public to examine the procedures it will follow.

Again, argue that any State plan for enforcing new source standards would constitute a revision of the rules and regulations of the original implementation plan and must be treated as such by being subjected to public hearings. The original implementation plan will have to contain emissions limitations covering all the types of sources for which new source standards will eventually be set. Any enforcement plan for tougher new source standards, then, will have to supersede – therefore revise – the enforcement measures of the original plan.

It might be argued that new source standards will apply to some types of pollutants that can not be controlled under an implementation plan because implementation plans can only deal with the six major pollutant types. An enforcement plan for new source standards for these other kinds of pollutants, then, couldn't possibly revise an implementation plan and therefore wouldn't require hearings.

This argument is correct, but not very damaging. First, it applies only to a small group of pollutants. For example, new source standards for the first five categories of sources to be listed by EPA cover only one kind of pollutant not covered by implementation plans – sufuric acid mist emitted from sulfuric acid plants. Second, Section 111(d) of the Act requires the Administrator to establish procedures, similar to those for regular implementation plans, requiring States to submit implementation plans for existing sources of pollutants that are covered under the new source standards but are not covered by the regular plan. Presumably, the Administrator's procedures for these extra implementation plans would require hearings like those for the regular plans, including hearings on revisions. Any State request to enforce federal standards for new sources of these pollutants would constitute a revision of one of these extra plans.

According to Section 112, "...the term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable...." It cannot be argued, then, that a State plan for enforcing these standards should be subject to public hearings because it constitutes a revision of the original implementation plan. Still, the general argument can be made (as it can with the other two Sections) that the procedures for enforcing hazardous pollutant standards are of as much legitimate concern to the public as those of the regular implementation plan and therefore ought to receive the same public attention. Though it may not affect the shape of the original implementation plan, this argument should be made at the hearings to reinforce the parallel between the admitted need for hearings on implementation plans and the need for hearings on hazardous pollutant procedures.

I. PROVISIONS FOR INTER-GOVERNMENTAL COOPERATION

Section 110(a)(2)(E) of the Act requires an implementation plan to contain:

> "adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region."

Section 420.20(d) of the Guidelines repeats this requirement, and section 420.21 sets specific requirements:

> –An agency writing an implementation plan for one part of an interstate region must share information with agencies writing plans for other parts of the region.
>
> –An implementation plan must state which State and local agencies will be responsible for carrying out the plan and what their responsibilities will be.
>
> –State agencies enforcing plans must share information with State agencies enforcing plans in other parts of interstate regions or in adjoining regions.

These requirements are addressed to a thorny set of problems. A State is responsible only for the part of an interstate air quality control region within its boundaries. Different States' parts of the same interstate region share the same general air pollution problem, and their control efforts are

bound to affect one another. Similar problems often occur between adjoining regions. Sources near boundaries may be controlled sufficiently for the purposes of their own area, but may still pollute another area. Different and conflicting control strategies and compliance schedules may be followed in adjoining areas. One area may get an extension while an adjoining one does not. Neighboring regions may be given different priorities, and therefore have to meet different requirements, even though a low priority area may contribute to a high priority area's problem.

The general provisions in the Act and Guidelines require implementation plans to include all measures necessary to deal with these problems, but the specific requirements in the Guidelines are incomplete. Without detailed knowledge, moreover, it will be difficult for EPA to reject any plan for failure to deal with these problems. It is important that you pay close attention to your plan's provisions for inter-governmental cooperation.

Urge State and local authorities responsible for writing and implementing the plan for your area to cooperate closely with authorities from adjoining areas. The Guidelines require only information sharing, on request. Press for continuing, close cooperation at every stage in writing the plans. Look at proposed plans for adjoining areas and coorinate efforts with clean air groups in those areas.

If your plan covers part of an interstate air quality control region, all its key elements should provide for cooperating with control authorities in the rest of the region.

–Control measures and compliance schedules should be as uniform as possible.

–Any description of existing ambient pollution conditions should include estimates of the effects of pollutant sources in your area of the region on ambient pollutant levels in other areas.

–Emission inventories should include information on sources outside your area that contribute to its pollution problem.

–Control strategies and compliance schedules should be as uniform as possible, and should take account of problems in the entire air quality control region.

–Plans should include detailed and practical procedures for sharing monitoring and other information among control authorities throughout the region.

–Emergency episode procedures should be highly coordinated. It may even be best to establish a single nerve center for the entire region, under which the various control authorities must work.

–Any permit system or other procedure for examining construction of new sources should be uniform within the region.

Considerations similar to these apply to implementation plans for adjoining AQCR's. Uniform control strategies and emergency procedures are probably not as practical or important in this case, but they should take inter-regional problems into account.

In both cases, requests for exemptions or extensions should be required to include detailed statements demonstrating that the extension or exemption will not interfere with attainment or maintenance of a Standard in any adjoining region or part of a region.

J. USED AUTOMOBILES

One of the major weaknesses of the Clean Air Act of 1970 is its failure to deal adequately with the subject of used cars. The new Act prescribes stringent standards for vehicles manufactured after the enactment of the legislation, but ignores those vehicles already on the road. At present, there are over 100 million "used vehicles" on the highways which do much of the serious polluting of the air. These vehicles will live well beyond 1975, when the strict federal standards for new motor vehicles take effect. The result will be that in 1975 when eight to nine million new vehicles sold that year will have to meet rigid national emission standards, approximately one hundred and forty million used vehicles on the road will have to meet either no minimal national standard at all or the much less stringent standards of previous years.

Section 221 of the Senate amendments to the 1970 Act that dealt with this problem failed to survive the House-Senate Conference Committee and was deleted. This Section would have established federal standards of performance for air pollution control devices or systems installed on pre-1968 vehicles. Congress also rejected two plans that would have imposed a retroactive installation obligation upon the auto manufacturers, and would have established a federally-subsidized program for installation of pollution control devices on used vehicles. Since all of these measures failed to

appear in the final version of the Act, the States will be the governing bodies that must deal with the problems of used vehicles.

One potential means of controlling auto emissions available to the States is auto inspection systems. These are test systems that diagnose the amount of pollutants a car is emitting. The implementation plan set forth in Section 110 of the Act specifically requires that each region develop inspection and testing programs for motor vehicles. Under Section 210, the EPA Administrator is authorized to make grants to the State totalling two-thirds of the costs of "developing and maintaining effective vehicle emission devices and systems, inspection and emissions testing and control programs." But under a similar provision of the 1967 Act, not one State applied for the two-thirds grant for developing an inspection program, and only New Jersey, under other provisions of the 1967 Act, applied for and received a demonstration grant to support the development of emission testing procedures suitable for inspection programs. Clearly, the States must move quickly to implement inspection and enforcement programs to control air pollution from used vehicles. The problem is that some States do not yet have an agency formed to qualify for a federal grant, and some of those which have agencies lack the expertise either to test control devices or to establish emission standards for used vehicles. Some States will have difficulty in affording even one third of the cost of implementing an enforcement program. Such States should be granted additional federal expertise and financial assistance, as needed.

New Jersey is about to institute a motor vehicles inspection system called a "retro-fit system". This is a diagnostic system that will test cars for carbon monoxide and hydrocarbon emissions at "idle mode only", i.e., while the car is stationary and the engine is in neutral. This inspection system has received much publicity and it is an admirable attempt to measure auto emissions. It has, however, several important faults. Automobiles, under this system, will be tested only when they are not moving. This does not nearly approximate the actual reality of driving conditions, especially in congested urban areas where drivers often stop and start their engines as much as they actually drive them. In recent test, scientists have concluded that a substantial amount of the emissions from engines occurs at the cold start. This system does nothing to measure the pollutants emitted when a car is started. Further, the New Jersey system requires specially trained mechanics who know how to operate the measuring devices used in the test and how to correct the malfunctions of the car. If citizens are to receive adequate testing and correction services, a massive education of servicing mechanics would be in order.

Unfortunately, aviable, accurate auto inspection system does not now exist. Citizens should press their States to investigate all possible systems, and to conduct their own experimentation programs. In the meantime, States should be urged to consider imaginative and innovative alternatives to inspection systems. Until such systems are available, citizens should press States to consider imposing measures to control automobile traffic in congested urban areas. In some cities, States may have to bar nonessential traffic if the National Air Quality Standards are going to be met.

K. RESOURCES

A State's implementation plan must contain a section describing the resources (funds, manpower, and equipment) that it will need to carry out the plan, as well as a summary of what resources already exist, and how and from where they will be supplemented. Without an adequately funded and well-staffed agency, a State cannot hope to conduct and enforce a powerful implementation plan. The following describes the money that Congress had made available to the States and how it can be used; and the roles and functions different State control agencies will have to perform, in order to implement their plan. Citizens can play an important role by serving as watchdogs to ensure that their State has secured for itself sufficient funds and adequately trained personnel to undertake a strong control program.

1. *Funding*

Providing financial and technical assistance to State, local and regional air pollution control agencies is a major responsibility of the federal government under the amended Clean Air Act. This assistance is intended to supplement the resources available to such agencies from State and local governments and the assistance they can obtain from non-governmental sources.

1. Grants to Establish and Maintain Air Pollution Control Programs:

–Grants to State, local and regional agencies to assist them in developing, establishing, improving and maintaining programs for the prevention and control of air pollution, in-

cluding implementation of air quality standards. *Two* federal dollars can be made available for every *one* dollar of State and local expenditures for agencies serving a *single* State or municipality. For inter-jurisdictional agencies, awards can be made on a three-to-one basis.

–To be eligible for project support, air pollution control agencies must plan, develop, or have an acceptable "workable program". Projects for the purpose of planning or developing a workable program are generally expected to be completed in two years or less.

–Control program maintenance is intended to provide control agencies with continuing federal financial assistance for the maintenance of effective operating workable programs. Maintenance grant support is awarded for a maximum of one year at a time; however, once support has begun, the grantee agency can plan on continuing support as long as satisfactory progress has been made.

–Eligibility for program maintenance support will be established by adequate documentation that the applicant agency is, in fact, executing an effective workable program.

2. Planning Grants to Control Agencies:

–Where an air quality control region includes parts of *two* or more States, it is essential that those States coordinate their Standard-setting and development of implementation plans. To facilitate such coordination, the federal government can pay, for two years, up to *100%* of the air quality planning program costs, and thereafter up to three-fourths of the cost of such activities can be authorized. This support can be provided to only a single agency in each interstate air quality control region.

–The principal purpose of this grant is the development of implementation plans for consideration and possible adoption of the State(s) involved. In addition, such support can be provided for long-range planning relating to the prevention and control of air pollution in such areas as transportation, fuel-use policies, land-use patterns, power generation, and solid waste disposal. Because there is a close relationship between the quality of air and areas of activity such as those mentioned above, States should call on existing broad-based planning agencies for assistance in the development of air quality standards and implementation plans in interstate air quality control regions. In many places, regional councils exist which have a capability for providing such assistance.

One good indicator of the ability of a State control agency to function properly is its per capita expenditures. In general, pollution is population-oriented – the larger the population concentration, the greater the pollution problem, and therefore the higher the costs of control must be per person. The following table gives an outline of HEW's estimates of the minimum expenditures required for various control program models. The figures are only guidelines, as specific factors in each community or region would determine actual expenditures.

Of the fifty-five State and territorial programs being financed by the grants program in 1970, only six have reached an annual per capita expenditure of 25¢, which has generally been considered the minimum expenditure needed for State programs. Only 23 (including the six) are spending as much as 10¢ per person per year.

Local and regional programs are at the present time doing better with 44% of the agencies spending what has been considered adequate for a minimal program. Sixty-four of the 144 grantee agencies are spending at least 40¢ per person per year, which has been estimated to be the minimum needed for local programs. The new provisions of the 1970 Act will clearly necessitate higher expenditures at all levels. How much is still unclear. Citizens must, however, press for expenditures that support a real effort by their State to abate pollution. Clearly, if a State is spending a per capita amount of eight-thousandths of a dollar a year (as in the case of Alabama), vast increases in expenditures must be made. The following table lists State-by-State per capita expenditures, along with the State and local air pollution control budgets and sources of funding. These figures will show you how much each State has actually been spending, and may also indicate how much more the residents of your State should be spending.

TABLE 1

Population	Model Programs	Required Number of Staff Positions	Staff Position Per 100,000 Population	Total Annual Budget $	Annual Per Capita Cost $
20,000	complaint	0.5[a]	2.5	5,000	0.25
50,000	complaint	1.25	2.5	12,500	0.25
50,000	nominal	1.5	3.0	15,000	0.30
250,000	nominal	7.5	3.0	75,000	0.30
250,000	intensive	10	4.0	100,000	0.40
500,000	intensive	20	4.0	200,000	0.40
1,000,000	intensive	40	4.0	400,000	0.40

a– Fractional staff positions represent persons in existing departments who would devote only part of their time to the air pollution program.

(From "Manpower and Training Needs for Air Pollution Control", *Report* of the Sec. of HEW to the Congress. Sen. Doc. No. 91-98 (August, 1970) U.S. Gov. Printing Office.)

TABLE 2. CONTROL PROGRAMS BUDGET–FISCAL YEAR 1970

STATES	Population (in millions)	Dollars/ capita	Total Budget	Total Federal Funds	Total Non-Fed. Funds	Total State Program	State Program Federal Funds	State Program State Funds	Total Local Program	Local and Regional Programs Federal Funds	Local and Regional Programs Local Funds
Alabama	3.373	.008	27,142	14,642	12,500	–	–	–	27,142	14,642	12,500
Alaska	.294	.30	89,192	65,915	23,277	–	–	–	89,192	65,915	23,277
Arizona	1.752	.47	819,437	313,978	505,459	376,719	181,978	194,741	442,718	132,000	310,718
Arkansas	1.886	.057	108,600	59,600	49,000	108,600	59,600	49,000	–	–	–
California	19.696	.634	12,646,206	2,470,821	175,385	4,348,582	800,000	3,548,582	8,297,624	1,670,821	6,626,803
Colorado	2.195	.447	980,623	521,939	458,684	323,485	144,990	178,495	657,138	376,949	280,189
Connecticut	2.987	.331	994,288	490,083	504,205	438,473	199,758	238,715	555,815	290,325	265,490
Delaware	.542	.730	369,308	197,308	172,000	369,308	197,308	172,000	–	–	–
Dist. of Columbia	.746	.471	351,202	234,134	117,068	351,202	234,134	117,068	–	–	–
Florida	6.671	.251	1,673,659	963,427	710,232	857,392	500,000	357,392	816,267	463,427	352,840
Georgia	4.492	.135	602,986	317,084	285,902	401,818	181,484	220,334	201,168	135,600	65,568
Hawaii	.748	.00	–	–	–	–	–	–	–	–	–
Idaho	.698	.121	84,698	47,180	37,518	84,698	47,180	37,518	–	–	–
Illinois	10.973	.371	4,061,370	1,105,050	2,956,320	–	–	–	4,061,370	1,105,050	2,956,320
Indiana	5.143	.154	791,637	335,571	456,066	194,858	74,378	120,480	596,779	261,193	335,586

STATES	Population (in millions)	Dollars capita	Total Budget	Total Federal Funds	Total Non-Fed. Funds	Total State Program	State Program. Federal Funds	State Program. State Funds	Total Local Program	Local and Regional Programs Federal Funds	Local and Regional Programs Local Funds
Iowa	2.789	.062	171,764	121,736	50,028	–	–	–	171,764	121,736	50,028
Kansas	2.222	.106	236,100	127,666	108,434	96,433	46,766	49,667	139,667	80,900	58,767
Kentucky	3.160	.336	1,063,442	534,370	529,072	783,555	438,370	345,185	279,887	96,000	183,887
Louisiana	3.546	.095	336,202	154,000	182,202	336,202	154,000	182,202	–	–	–
Maine	.977	.083	81,000	54,000	27,000	81,000	54,000	27,000	–	–	–
Maryland	3.874	.608	2,350,264	599,304	450,489	1,049,793	1,435,556	914,708	1,300,471	836,252	464,219
Massachusetts	5.630	.184	1,039,117	324,000	195,000	519,000	574,500	464,617	520,117	250,500	269,617
Michigan	8.776	.265	2,032,483	281,036	232,001	513,037	1,317,687	714,796	1,519,446	1,036,651	482,795
Minnesota	3.767	.167	626,759	133,474	139,937	273,411	326,853	299,906	353,348	193,379	159,969
Mississippi	2.158	.046	100,000	66,000	34,000	100,000	66,000	34,000	–	–	–
Missouri	4.636	.317	1,465,098	183,588	139,079	322,667	768,201	696,897	1,142,431	584,613	557,818
Montana	.682	.394	269,024	85,672	66,057	151,729	155,441	113,583	117,295	69,769	47,526
Nebraska	1.468	.099	145,594	62,992	31,496	94,488	89,729	55,865	51,106	26,737	24,369
Nevada	.481	.765	368,494	0,740	10,370	31,110	213,599	154,895	337,384	192,859	144,525
New Hampshire	.722	.099	71,948	1,000	37,948	71,948	34,000	37,948	–	–	–
New Jersey	7.089	.371	2,623,735	1,182,431	1,197,987	2,380,418	1,346,369	1,277,366	243,317	163,938	79,379
New Mexico	.998	.365	364,912	152,214	102,535	254,749	216,972	147,940	110,163	64,758	45,405
New York	17.979	.565	10,192,912	845,400	2,314,664	3,160,064	2,527,285	7,665,627	7,032,848	1,681,885	5,350,963
North Carolina	4.961	.191	949,890	233,108	171,054	404,162	586,448	363,442	545,728	353,340	192,388
North Dakota	.610	.044	27,160	15,000	12,160	27,160	15,000	12,160	–	–	–
Ohio	10.542	.168	1,756,352	723,335	1,033,017	280,496	100,000	180,496	1,475,856	623,335	852,521
Oklahoma	2.498	.099	241,587	127,365	114,222	168,463	89,208	79,255	73,124	38,157	34,967
Oregon	2.056	.522	1,070,140	546,600	523,540	307,739	79,443	228,296	762,401	467,157	295,244
Pennsylvania	11.663	.437	5,097,648	2,337,033	2,760,615	2,978,054	1,204,222		2,119,594	1,132,811	986,783
Rhode Island	.922	.186	169,651	83,418	86,233	169,651	83,418	86,233	–	–	–
South Carolina	2.522	.263	670,212	303,403	366,804	454,429	165,664	288,765	215,783	137,744	78,039
South Dakota	.661	.00	–	–	–	–	–	–	–	–	–
Tennessee	3.383	.413	1,392,357	885,794	506,563	651,824	420,094	231,730	740,533	465,700	274,833
Texas	10.989	.167	1,835,921	1,160,894	675,027	617,850	379,134	238,716	1,218,071	781,760	436,311
Utah	1.060	.208	221,356	98,996	122,360	221,356	98,996	122,360	–	–	–
Vermont	.437	.18	78,975	52,650	26,325	78,975	52,650	26,325	–	–	–
Virginia	4.543	.118	536,039	287,896	248,143	316,820	150,260	166,560	219,219	137,636	81,583
Washington	3.352	.708	369,819	1,184,855	1,184,964	1,173,000	450,000	723,000	1,196,819	734,855	461,964
West Virginia	1.701	.263	446,695	221,187	225,508	422,373	211,187	211,186	24,322	10,000	14,322
Wisconsin	4.366	.042	183,437	54,800	128,637	174,000	50,000	124,000	9,437	4,800	4,637
Wyoming	.328	.121	39,950	25,720	14,230	39,950	25,720	14,230	–	–	–
Puerto Rico			244,720	140,716	104,004	244,720	140,716	104,004	–	–	–
Virgin Islands			59,862	39,392	20,470	59,862	39,392	20,470	–	–	–
Totals			64,530,967	26,076,203	38,454,764	26,865,623	11,273,009	15,592,614	37,665,344	14,803,194	22,862,150

A control agency must perform many different and difficult roles. It must serve not only as the management center for the State's or region's control of pollution, but must also perform technical, engineering and enforcement services as well. The basis of a strong, dynamic control agency is a thorough control strategy, a well-funded program and a competent staff, sufficient in number to perform its many jobs. The following is a list of functions, drawn up by the Department of Health, Education and Welfare, that a control agency must be able to undertake.

1. Management Services

–Policy, public relations, intergovernmental relations and development of control strategies and plans: These functions include the variety of special activities required of an agency director and his immediate staff in order to conduct a meaningful control program. As an agency increases in size, specialists such as systems analysts, public relations experts, and technical writers may be involved. For small agencies, these skills may be part of the duties of the major supervisors.

–Administrative and clerical support: This function includes budgeting, record keeping, filing, typing and related work, as normally required to operate an agency. Clerical staff of the agency are included in this category.

2. Technical Services

–Laboratory operations: This function includes all laboratory support activities necessary for source sampling, ambient air monitoring and special studies.

–Operation of monitoring network: This function relates to the routine servicing and operation of air sampling and meteorological instruments deployed in the field for continuous surveillance of air quality and diffusion characteristics. The data generated are used as input in diffusion models for prediction of future air quality and the development of control regulations; to determine the effectiveness of agency operation in reducing and/or preventing air pollution; information and education purposes.

–Data processing: This function includes data reduction processing, and statistical treatment for air sampling meteorology, emission calculations and development of inspection schedules.

–Special studies: This function includes a variety of special studies conducted for purposes of locating sampling stations, determining contribution of specific sources to ambient air pollution levels, and determining need for new regulations.

–Instrument calibration and maintenance: this function includes those duties to ensure the proper operation of sampling, analytical and meteorological instruments operated by the agency.

3. Enforcement Services

–Complaint handling and field patrol: This function includes the operation of a continuous field patrol to enforce regulations on open burning, visible emissions, odors, etc.

4. Engineering Services

–Calculation of emission estimates: This function relates to the work done in estimating emission rates from various sources and source categories to provide information on program effectiveness, potential future problems within an agency's area of jurisdiction, location of sampling stations, and need for new regulations.

–Development of control regulations, preparation of technical reports on control and review of industrial control plan for episodes. These areas are generally project-oriented or considered part-time responsibilities of the engineering staff.

Generally, this estimate by HEW of the manpower necessary to run an effective control agency is probably conservative. It would staff an efficient agency that could deal fairly adequately with any problem they know about. It does not appear, however, to staff an agency that actively goes out and tracks down pollu-

ters, or maintains continuous monitoring of sources, or is able to judge whether violations exist based on polluters' reports. HEW makes no provisions for the legal manpower that will be necessary to bring suits against violators. If a control agency is going to be effective, it must be able to undertake active and vigorous action of all types. Citizens should make sure that their States' agencies do not serve just as administrative centers.

In general, the cost of a control agency will vary greatly, depending on how much of the economic burden of collecting information polluters must be made to bear. This cost may involve establishing and running monitoring and testing systems, and of keeping detailed records. This point is more thoroughly discussed above at pages 30-38.

3. *Future Manpower Needs*

A predictive model was developed and used by the government to estimate the manpower needs of State and local air pollution control agencies. The modeling procedure assumes that the workload in an air pollution control program is related to certain economic-geographic-demographic characteristics such as land-area, number of manufacturing establishments, population and rate of new capital expenditures for industrial plants in the area served, and to the nature and extent of the regulatory functions of such a program.

Four types of programs have been defined by HEW for the purpose of estimating manpower needs (only one of these categories may apply to the program or programs in your State):

1. *State programs* – encompassing administration of programs in any areas of the State not covered by a comprehensive local or regional program. (Under the 1970 Amendments, the State agency retains supervisory responsibility for all other areas also.)

2. *Comprehensive local or regional program* – at least county-wide, with boundaries defined by standard metropolitan statistical areas (SMSA). Such programs operate without support from the State.

3. *Noncomprehensive local or regional programs* – for SMSA's without sufficient resources for engineering activities. Supplementary manpower is provided at the State level.

4. *Minimal regulatory program* – for small SMSA's or for cities of 25,000 – 50,000 outside SMSA's for all operation of sampling equipment, answering of complaints, and annual inspection of boilers and incinerators.

In practice, the amount of time that an air pollution control agency spends on a given function depends on a number of factors, including age and size of the agency, number and type of regulators, nature of work (i.e. correction versus prevention), etc. The HEW prediction model is based on an ideal agency that has resources to perform all assigned functions, has overcome initial problems, and has a program underway. Accordingly, based on the economic-demographic data available in 1969, State and local agency requirements are expected to increase from 2,300 persons actually employed to estimated 8,000 by 1974. The greatest needs are for engineers, administrative and clerical personnel, inspectors, and technical people. In 1969, there were approximately 700 full-time engineering positions. By 1974, there will be 1,464 positions to be filled. The same increase in positions is expected to occur in all the professions associated with control programs. To meet these projections, State and local air pollution control agencies must increase personnel almost 300% over the next four years. The agencies are expected to have major recruitment problems. There are just not enough qualified persons to meet the expanding needs of the control agencies. The air pollution control office of EPA plans to expand its efforts to meet these needs through recruitment of professional personnel, through university and community college sponsored training, and through the establishment of a job register referral system for State and local employment opportunities.

How can your State conduct its control strategy without a sufficient staff? Until adequate personnel is available, encourage your State to make use of federal technical assistance. Under the Clean Air Act of 1970, assistance is available to State and local agencies in developing air quality monitoring programs, designing emission inventories, meterological studies, simulation modeling, data processing and developing laws and regulations. EPA has also contracted with a number of private consulting companies that have agreed to assist States in formulating their implementation plans. The list of these companies is included in the Manual on pages 68-9. Citizens should realize that, although competent staff is not available in the numbers the country now requires to man State, local and regional programs' there are ways that agencies can deal with this shortage and still produce and enforce an adequate implementation plan.

IV. SUBMISSION AND APPROVAL OF IMPLEMENTATION PLANS

This Part discusses and suggests responses to a set of interrelated problems concerning the submission and approval of implementation plans, including extensions of submission deadlines, submission of inadequate plans, and possible legal action against EPA approval of inadequate plans or unwarranted extensions.

A. EIGHTEEN-MONTH EXTENSION OF SUBMISSION DEADLINE FOR SECONDARY STANDARD IMPLEMENTATION PLANS

Section 110(b) of the Act states:

> "The Administrator may, whenever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed eighteen months from the date otherwise required for submission of such plan."

The Act says nothing about what makes an extension "necessary." The Guidelines (section 420.31) add four conditions:

> –Only Priority I and II air quality control regions may receive such extensions.
>
> –Any request for an interstate AQCR must be made jointly or with the knowledge of the other States in the region.
>
> –Any request for an extension must demonstrate that "attainment of the secondary standards will require emission reductions exceeding those which can be achieved through the application of reasonably available control technology."
>
> –Any request must be submitted long enough before January 30, 1972, to allow the State to submit an adequate Secondary Standard implementation plan by that time if the extension request is denied.

These are loose conditions, and you may expect that your State will be pressed hard by industry to request such extensions. Though it seems the stiffest, the third condition is the weakest, because it is pegged to the formal definition of "reasonably available control technology" in section 420.1(o) of the Guidelines. Remember that this definition, in effect, allows a State to adjudge control devices as "not reasonably available" because their "economic impact" (that is, cost) is too great. (See pages 16-17, above, for discussion of this point.)

Remember also that sulfur oxides and particulate matter are the only pollutants for which the national Secondary Standards are stiffer than the Primary Standards; for the other pollutants, the Standards are identical. This means that requests for extensions of the deadline for submission can only come for plans implementing the Secondary sulfur oxide and particulate Standards. The Guidelines require, moreover, that Secondary sulfur oxide Standards be met three years after EPA approval of a plan implementing them unless certain exemption conditions are met.

The practical result of all this will be that sulfur dioxide polluters will put heavy pressure on State agencies to request 18-month extensions on the grounds that cleaning up in three years is too expensive. Equip yourself to counter this pressure by arguing that the "economic impact" language in the Guidelines' definition of "reasonably available control technology" is not warranted by the Act. Learn about the costs of controlling sulfur dioxide pollution, since there seems reason to suspect the cost contentions of at least the copper industry with respect to sulfur dioxide control.

Find out quickly if your State plans to request an extension for any air quality control region. If the answer is that they are not sure, point out the fourth requirement for an extension listed above and warn that failure to submit an adequate plan for a Secondary Standard will result in EPA's writing one that the State must then enforce.

If the answer is that the State will request an extension, get a copy of the formal request and whatever information was submitted to demonstrate that reasonably available control technology is not adequate to meet the Standards. You have a perfect right to this information. Ask both the State and the regional EPA office for it.

Assess the arguments in the request. It may be that the extension is genuinely needed, particularly if the State agency is already having difficulty writing the Primary Standard plans. Try to get expert help to evaluate the request, particularly if it is based on cost arguments. Submit written comments on it to your Governor, the State agency and to EPA, and try to deal with the request at any hearings this fall on Primary Standard implementation plans. Remember that nothing in the Act or the Guidelines requires that the extension be 18 months long. Make sure that the arguments backing up the request justify the

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length of the extension requested. A request based heavily on cost arguments made through the definition of "reasonably available control technology" is particularly open to challenge. If you are displeased enough with the extension request to consider court action if it is approved, be sure to make this clear in advance.

B. FAILURE TO SUBMIT ADEQUATE IMPLEMENTATION PLANS

Section 110(c) of the Act states:

"The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if:

(1) the State fails to submit an implementation plan for any national ambient air quality primary or secondary Standard within the time prescribed,

(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section . . . .

The Administrator shall, within six months after the date required for submission of [a] plan . . . promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan. . . which the Administrator determines to be in accordance with the requirements of this section."

These provisions have their good and bad sides. They are good in that they prevent an endless trading back and forth between a State and EPA of slightly revised versions of a plan. Instead, there is a definite deadline. EPA must respond quickly to an inadequate plan proposing revisions. These will amount, in practice, to suggestions to the State to revise and resubmit its plan as EPA desires. If the State fails to do this for six months, the revisions go into effect anyway, and the State is responsible for implementing and enforcing the entire plan.

The bad side is that a State can use these provisions to get what amounts to a six to ten month extension of the submission deadline for Primary and Secondary Standard implementation plans. A State may submit a plan in January that it knows is inadequate, wait for six months after EPA rejects it, then submit an adequate plan at the last minute. EPA's proposed revisions then become a kind of free preliminary review.

With or without these procedures, of course, a State might submit no plan at all. Such a State would still be responsible for implementing and enforcing whatever regulations EPA promulgated, but the further problem would then be likely to arise that States would be unwilling to enforce whatever plan or parts of a plan EPA imposed.

Respond to any clear State intention of not submitting a plan, or of submitting a clearly inadequate plan, by publicizing the fact and bringing whatever pressure you can to bear on the State. Since it is not illegal to fail to submit an adequate plan or to submit no plan at all, you have little additional recourse in response to this problem except to argue to the State that it, not EPA, will be responsible for enforcing whatever plan EPA imposes.

Making this argument will be tricky, but it can be effective if done carefully. The State will point out first that a person (including any governmental agency) can be sued under the citizen suit provision of the Act (Section 304) *only* for violation of an "emission standard or limitation or an order issued by the Administrator [of EPA] or a State with respect to such a standard or limitation." Nowhere is provision made for citizens to sue a State for failing to enforce an implementation plan, whether its own or EPA's.

Section 113, however, allows EPA to step in and enforce a plan if the State fails. The State will point out next that this provision (Section 113(a)(2)) *requires* only that EPA give notice that State enforcement of the plan is inadequate; EPA is not required, but only *may*, issue compliance orders to force persons to comply with the State plan. This means, in effect, that citizens cannot sue to force EPA to step in when States fail to enforce a plan. The State may also point out that EPA will have difficulty stepping in to enforce an entire State plan, particularly if several States do nothing.

The response to this is that there is a much easier way EPA can ensure that States will enforce their plans. The first part (113(a)(1)) of Section 113 says that the Administrator, in response to information made available to him from any source, shall first notify and then may order any person to comply with "any requirement of an applicable implementation plan." Since the State agency is a "person," the Administrator may order the State to comply with anything it is required to do under the implementation plan, and citizens *can* sue the State for violating that order. While EPA is not obliged to issue such orders, it will be very likely to if the State is failing to enforce a plan and if EPA knows that citizens are ready to sue for non-compliance with such orders. Issuing these orders, moreover, will relieve EPA of some of its enforcement burden, and it will be that much more likely to issue the orders. It might even anticipate this procedure by writing into the plan it imposes on a recalcitrant State as many specific requirements as possible. All of this, along with your intention to provide the necessary legal action, should be made clear to a State that appears unlikely to enforce an implementation plan.

C. LEGAL ACTION AGAINST IMPLEMENTATION PLANS AND EXTENSIONS

The EPA Administrator's approval of an implementation plan or grant of an extension can be overturned in court, provided an adequate basis for the action has been laid beforehand. It is not easy, and you should not count on it. Consider it an outside chance, to be pursued if all else fails. You almost surely will have a greater chance of success by working within the prehearing procedures, unless your State is simply and openly hostile to implementing the Act. Under these circumstances, the State is likely to make the kind of mistakes which increase your chances of success in court. In any case, lay the foundation ahead of time, so that the option remains and can be used to bargain with.

An implementation plan submitted for EPA approval can be inadequate for reasons that fall into two categories:

–The plan was adopted by the State using faulty procedures: failure to give adequate public notice or to make the proposed plan available, failure to hold a hearing, changing the plan fundamentally after the hearing, etc.

–The content of the plan does not meet the requirements of the Act and Guidelines.

Three of the four kinds of extensions open to the States are likely to be granted between now and the end of the four month approval period beginning on January 30, 1972.

–Eighteen-month extensions of the submission date for Secondary Standard implementation plans must be granted well in advance of January 30.

–Two-year extensions of the time in which a State must comply with a national Primary Standard must be granted when the original plan is approved.

–Extensions of the time in which a State must comply with the Secondary sulfur oxide Standard must be granted when the original plan is approved.

A plan or an extension can be overturned by petitioning the United States Court of Appeals for the Circuit in which you live for review of the Administrator's decision to approve the plan or grant the extension (Section 307(b)(1)). If a court is asked to "review" the Administrator's decision, it is charged only with determining whether, based on the information he had available to him – the "facts on the record" – the Administrator made a reasonable decision. Only if the decision was largely inconsistent with the facts on the record – if it was "arbitrary" or an "abuse of discretion" – may a court overturn the decision.

It is all-important, therefore, that you do everything possible to get all your arguments and evidence against a plan or extension "on the record" before the Administrator, before he examines it. Arguments made and background information submitted at the public hearing will appear in the transcript which must be submitted to the Administrator and which he must consider. In many States, written testimony can be submitted for a certain period after the hearing is over. Any of the three kinds of extensions, not just the content of a proposed plan, can validly be discussed at the hearings. Written arguments should also be sent to the Administrator after a proposed plan or a request for an extension has been submitted to him. Make your arguments detailed and factual, and submit as much technical information and expert testimony as possible.

If you think that legal action may be necessary, try to get the help of an attorney well in advance of January. You will be able to develop your case sufficiently to indicate to the State and to EPA that you intend to challenge the plan or the extension in court, and you will be able to begin building a record adequate to overturn any adverse decision the Administrator makes.

V. EXEMPTIONS AND VARIANCES

The Act and Guidelines contain several procedures for postponing compliance with the requirements of the Act or of implementation plans:

–an 18-month extension of the deadline for submitting plans implementing a Secondary Standard,

–a 2-year extension of the time in which a state must comply with the national Primary Standards,

–a 1-year extension of the time in which certain sources must comply with certain measures of an implementation plan, and

–an extension of the time in which a state must comply with national Secondary Standards for sulfur oxides.

It is essential that you know these procedures well and pay constant attention to their implementation and enforcement. The first has been discussed on pages 51-2. The others are dealt with here.

A. TWO-YEAR EXTENSION OF PRIMARY STANDARDS COMPLIANCE TIME

1. *Requirements of the Act and Guidelines*

Under Section 110(e) of the Act and Section 420.30 of the Guidelines, the Administrator may extend from three up to five years the deadline for attaining a Primary Air Quality Standard in an air quality control region. The Governor of the State must request such an extension at the time that the plan implementing that Standard is submitted. The Act sets strict conditions to be met before this extension can be granted:

1. The Governor must show that certain sources of the pollutant in question can not comply with the requirements needed to meet the Primary Standard for that pollutant in in three years because "necessary technology or other alternatives" will not be available in time.

2. The State must have "considered and applied reasonably available alternative means" of meeting the Standard and still concluded that it could not be done in time.

3. All sources other than the ones that cannot comply will still have to meet the requirements of the original plan for implementing the Primary Standard in three years.

4. The State must still apply "interim measures of control" acceptable to the Administrator to those sources that cannot comply with the requirements of the original plan.

The Guidelines elaborate on these conditions. A two-year extension may be sought only in Priority I regions (see section 420.3 of the Guidelines for a definition). A request for extension in an interstate region must be made with the Governors of all States included in the region. An implementation plan must be submitted by the State at the time the request for the extension is made. This plan must:

–set forth a control strategy for implementing the Primary Standard;

–show that necessary technology or alternatives needed for certain sources to carry out that control strategy in three years will not be available in time;

–provide for attainment of the Primary Standard *as fast as possible*, but in no case later than five years after the plan is adopted;

–identify any alternative means of attaining the Primary Standards that were rejected;

–show that sources that can comply will be required to; and

–show that interim measures will be applied to the sources that cannot comply.

2. *What to Do*

Until standards are set for new pollutants, the only requests for two-year extensions that can be made must be made on January 30, when plans implementing Primary Standards must be submitted. The Act does not allow extensions to be requested along with submission of revisions of plans, and the January 30 deadline cannot be extended. If you are concerned with a Priority I region, then, be on the lookout for these requests this fall.

If a request for an extension is to be made, it will probably be discussed at the hearings on the proposed plan. If the agency decides to make the request, the proposed plan that is available 30 days in advance should meet the requirements of the Act and Guidelines and contain detailed reasons why the extension is necessary. If the

agency is not itself inclined to make the request for an extension, industry may press them to do so, and such pressure is likely to come before and during the hearings. Be ready to meet these arguments at the hearings.

First, remember that a request for an extension must be submitted along with a full-scale implementation plan; the agency cannot simply request an extension and promise to get around to the plan later on. In all respects, except the statement of when the Primary Standard will be achieved and the measures to be applied to the sources that cannot comply with the original three-year requirements, this plan must be an acceptable plan for implementing the Standards in *three* years. An extension of the time limit for attaining the Standard because certain sources cannot comply is not a license to loosen the requirements for all sources.

Scrutinize carefully the case for requesting the extension. Make sure that it meets all the requirements set by the Act and the Guidelines. If possible, get someone with technical expertise to assess the crucial arguments about availability of necessary technology. Remember that the Act and Guidelines make no mention of considering cost or economic impact when assessing availability of technology. The fact that some device is expensive does not mean that it isn't available.

Make sure that "other alternatives" are also not available. "Necessary technology" means pollution control devices, such as wet scrubbers or precipitators. "Other alternatives" include such things as fuel composition controls, process changes, and land use and transportation controls. Make sure that these and other alternative measures have been either adopted or found not available or inadequate to produce compliance with the Primary Standard in three years.

The Guidelines require that the plan provide for attainment of the Standard "as expeditiously as practicable." Make sure that your State's plan does not allow five years when four would do.

Remember that thorough testimony at the hearings is important. The Administrator's decision to grant a two-year extension must be made, and can only be challenged, upon the contents of the plan submitted with the request and the record of the hearings on that plan.

It is possible that the agency might decide after the hearings to request a two-year extension. If you suspect, before or during the hearings, that this might happen, bring it up at the hearings. Even if you suspect nothing, the possibility of a last-minute request is an excellent reason for keeping close watch on the agency after the hearings. If such a request is made and a modified plan submitted, make sure you get a full copy of the request, the modified plan and other supporting documents as soon as possible. If you don't think the request is justified, publicize your objections and start putting pressure on your Governor and the agency. State your objections in writing to the regional EPA director and to Administrator Ruckelshaus. Contact the Project on Clean Air staff for help in this.

If a last-minute request was not dealt with at all at the hearings, there is probably a strong case for convincing the Administrator not to approve the request and its accompanying plan, or to overturn his approval should he grant it. It can be argued that any such plan submitted with a request for an extension must have been so extensively modified from the plan discussed at the hearings that it requires further hearings. If a last-minute modification of the plan is made, the public will not have had the required opportunity to deal with the arguments for or against the modification. If this line of reasoning fails to convince the Administrator to return the plan for further hearings, his approval of the plan and extension can be challenged in court on the same grounds. Mention made to the Administrator and the appropriate officials that you are considering court action may help forestall State adoption or EPA approval and bring the modified plan back for more public attention.

Remember that whether or not a request for extension was dealt with at the hearings, if you think the arguments for it are unsound, you can challenge the Administrator's approval in court. See page 53 for a discussion of how this is done.

B. VARIANCES

1. *Requirements of the Act and Guidelines*

Under Section 110(f) of the Act and Section 420.32 of the Guidelines, the Administrator may postpone the applicability of a requirement of an implementation plan to a stationary source or class of moving sources for up to one year. The Governor of the State in which the source is located can make a request for such a postponement at any time before the source is originally required to comply with the requirement of the plan. The Act sets, and the Guidelines amplify, four strict requirements all of which must be met for a request to be granted.

Under the Act, the Administrator must be satisfied that:

- –"good faith efforts" were made to comply with the requirement of the plan by the original deadline;
- –the source to be exempted cannot comply with the requirement in time because "necessary technology or alternative measures of control" are not available in time;
- –"...any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and"
- –"[t]he continued operation of such source is essential to the national security or to the public welfare."

The Act requires (Section 110(f)(2)(A)) that the Administrator's decision must be made on the record after notice and hearings, must be based on the entire record of the hearings, and must include a detailed statement of the reasoning behind the decision. The Act also provides (Section 110(f)(2)(B)) that the Administrator's decision can be challenged in court, and (Section 110(f)(2)(C)) that this court action must proceed as rapidly as possible, taking precedence over everything else on the court's docket. Section 110(f)(2)(D) gives the Administrator power to subpeona witnesses and information in any hearing or court action connected with requests for one-year postponements.

The Guidelines elaborate on the Act:

- –Any request involving an interstate region must be made by the Governors of all the States included in the region.
- –A request must identify which sources cannot comply with which provisions of the control strategy, and must include the information necessary for the Administrator to judge whether the conditions of the Act have been met.
- –The hearings on a request must be held sometime within the year preceding the date on which the source was originally required to comply.
- –While the request is being processed, the original provisions of the control strategy are still in effect for the source requesting the postponement.
- –If the State wishes to grant a postponement to a source, and that postponement will not "prevent attainment or maintenance" of a National Air Quality Standard, the State is not required to submit a request to the Administrator.

2. *What to Do*

Since "postponement of the applicability of a requirement of the implementation plan" is nothing more than a variance, the effect of these sections of the Act and Guidelines is to require public participation in and federal approval of any variances that jeopardize the attainment of National Air Quality Standards.

The Act and Guidelines impose stiff conditions on requests for these variances. A request must meet all four of the requirements of the Act at the same time. Hearings must be held, and the decision is subject to quick judicial review. No polluter can submit a request just before compliance is required and fail to comply on the grounds that the request is pending.

There are, however, several weaknesses in the request procedures that require close attention.

- –The phrase "good faith efforts" is vague. You should be sure that anyone claiming such efforts has done everything possible to comply.
- –What is "essential to the national security" is usually open to dispute. Use the narrowest possible definition.
- –"Public welfare" might be construed to mean a "healthy economy" or "maintenance of productive capacity." Again, allow nothing but a definition consistent with the meaning of this term in Section 109 and the Senate Report.
- –The Act and Guidelines say nothing about how long before hearings notice is to be given and whether copies of the request and supporting documents will be available in advance. Press for full, advance disclosure by the State of copies of any request for postponement and its supporting documents. Try to get such procedures written into your implementation plan. Since hearings on requests will probably be held through regional EPA offices, press the regional director to follow hearing procedures like those in the Guidelines for proposed implementation plans or like those described on page 58.

The most serious weakness of the procedures for granting one-year extensions of compliance time is that they apply to only one category of variances –those variances that will jeopardize attainment or maintenance of a National Air Quality Standard. Section 420.32(f) of the Guidelines states that variances that do not jeopardize national Standards need not be put through these procedures. Section 420.15(d) reiterates:

"Except as otherwise provided by Subpart C of this part, neither the State agency nor a local agency shall grant any variance of, or exception to, any compliance schedule included in an applicable plan if such variance or exception will prevent, or interfere with, attainment or maintenance of a national standard within the time(s) specified pursuant to §420.10(b) and (c)."

("Except as otherwise provided by Subpart C" refers to the one-year postponement procedures in section 420.32. That is, the only time a state or local agency can grant a variance that jeopardizes a national Standard is when it has requested and received federal permission. Sections 420.10(b) and (c) require that the plan specify when the Primary and Secondary Standards will be met.)

There are several situations in which the State could grant a variance from an implementation plan that would not jeopardize attainment of a national Air Quality Standard.

–An implementation plan might contain measures somewhat stricter than those required to attain the Standard in the specified time. A State could grant a variance from such requirements without following the one-year postponement procedures. The length of the postponement granted could be more than a year, and could extend up to the point where the variance would begin jeopardizing attainment of the national Standard.

–The Guidelines refer to national Standards only. States are allowed to set tougher standards, and their implementation plans would probably have correspondingly tougher requirements. Again, States would be free to grant variances from these tougher requirements without going through the postponement procedures, since they would not be jeopardizing any national Standard.

–Another such situation might occur when a State has been granted a two-year extension of the deadline for attaining the Primary Standard in a given AQCR. One of the conditions for federal approval of such an extension is that those sources which *could* comply with the requirements of a plan to attain the Primary Standard in three years would still have to, even though the requirements for other sources (those which couldn't comply with the original plan) would be modified and up to two extra years would be allowed to meet the Standard (see pages 54-5).

A State could grant a variance to one of the sources functioning under the requirements of the original (three-year) plan without following the one year postponement procedures, because such a variance might not jeopardize attainment of the Primary Standard *in the time specified in the approved implementation plan.* (Remember that the time specified in the modified plan will be between three and five years after the plan is approved and the request for an extension granted. If the deadline is extended the full two years, and if the interim measures for the sources that couldn't comply are not too strict, another source might successfully argue that extending the deadline for it to comply would not jeopardize attainment of the Standard.)

Fortunately, the Guidelines and the Act ensure that none of these variances can be granted without at least federal approval, and probably public hearings.

Section 420.32(f) ends by stating:

"... provided, however, that such determination [a State's determination to grant a variance that does not jeopardize attainment of a national Air Quality Standard] will be deemed a revision of an applicable plan under §420.6."

Section 420.6 states:

"(c) Revisions of rules and regulations included in an applicable plan shall be adopted after reasonable notice and public hearings....

(d) Any revision of rules and regulations and of compliance schedules shall be submitted to the Administrator... within 60 days following its adoption.

(e) Revisions other than those covered by paragraph (b) of this section [revisions made in response to changes in national Standards or technology or because the plan is inadequate] shall be identified in the semi-annual report...."

Section 420.8 states:

"The Administrator shall approve any plan, or portion thereof, or any revision of such plan, or portion thereof, if he determines that it meets the requirements of the Act. Revisions of a plan, or any portion thereof, shall not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part."

Section 420.6(d) guarantees, at least, that all State-granted variances which will not jeopardize a national Standard must have federal approval before taking effect. Together with section 420.6(c), section 420.6(d) seems to indicate that public hearings on these variances will not be required. A variance is a change in a compliance schedule, not a change in a rule or a regulation.

As we noted on page 42, however, section 420.6(c), (d), and (e) contradict the Act, which says that the Administrator shall "approve *any* revision of an implementation plan... if he determines that it... has been adopted by the State after reasonable notice and public hearings." [Our emphasis]

What should you do? Check the variance provisions of the proposed plan. Most States already have variance procedures of some kind, and the procedures in the proposed plan will probably reflect the existing ones. Some States may simply write the old procedures into the proposed plan and take no account at all of the fact that all variances from the plan must be federally approved.

Attack this problem by dividing all possible variances from the plan into two categories: those that will jeopardize attainment of a national Standard, and those that will not. Point out to the people responsible for writing the plan that the first category of variances must be requested from EPA through the procedures outlined in the Act and Guidelines. Press for provisions in the plan requiring that such requests and their supporting documents be made public.

Point out that the second category of variances are all considered revisions of the plan, and that such variances must be processed by the same procedures used for any revision of an implementation plan. These are procedures required to be in the plan by Section 110(a)(2)(H) in order for it to be approved. Pay close attention to these revision procedures. Point out that the Guidelines contradict the Act in this respect, and that the Act clearly requires reasonable notice, public hearings and federal approval of all revisions of a plan. Press for procedures incorporating:

– prominent advertisement of the date, time and place of all hearings on proposed revisions of the plan at least 30 days in advance;

– public availability at least 30 days in advance of complete copies of any proposed revisions and any supporting documents; including, if the proposed revision is a variance from the plan, a detailed statement why the requested variance will not jeopardize the attainment or maintenance of a national Standard;

– the right of any interested person at the hearing to cross-examine the person requesting a variance;

– a requirement (similar to Section 110(f)(2)(A)(iii) of the Act) calling for a detailed, publicly available, statement of the State's decision after the hearing;

– public availability of a complete transcript of the hearings;

– a requirement (similar to Sections 110(f)(2)(B) and (C) of the Act) providing for quick judicial review of the State's decision;

– a stipulation (similar to section 420.32 of the Guidelines) that no request for a variance releases the applicant from complying with the original requirements of the plan until the request is granted or denied;

– a requirement that the applicant for a variance demonstrate that compliance is impossible because necessary technology or alternatives are not available, that full efforts have been made to comply, and that all possible interim measures for control will be implemented according to a specific schedule;

– a specific limitation on the time periods for which variances can be granted (say, one year), and a requirement that a request for renewal of the variance be treated in the same way as any other request for a variance; and

– a stipulation that no variance granted to a source will operate to exempt it from the requirement of an applicable emergency episode plan.

Make sure that existing State law and regulations give the State adequate authority to do all these things. If the law is adequate but the regulations are lacking, point out that the State can simply promulgate such regulations. Make sure that no loose statements about economic

feasibility appear in the conditions for variances. There is no authority under the Act for such considerations in approving a plan or a revision of a plan.

Make sure either that no one except the State air pollution agency is given authority to grant variances from the plan, or that, if such agencies – particularly local authorities – can grant variances, they are required to follow the same procedures as the State agency. The phrase in the Guidelines (section 420.32(f)) that defines even variances which do not jeopardize national Standards as revisions of the plan, says nothing about local agencies. Make sure these are subject to State variance procedures.

If it looks as though the State agency is going to ignore the requirements of the Act for revision procedures, make it clear that you will attempt to overturn that part of the plan by appeals to the Administrator after the plan is submitted, or by legal action if the plan is approved. This may in itself produce the desired result, but if it becomes necessary to sue, remember that the requirements in the Act for public notice and hearings are unequivocal. It will also be useful to point out that section 420.6(c) already requires, for revisions of rules and regulations in the plan, notice and hearing procedures as thorough as those required for proposed implementation plans.

A final point: All discussion of variances so far has dealt with variances from State implementation plans under the Clean Air Act. It is possible that a State will have its own rules and regulations that are geared to meeting a State air quality standard and that these will not be submitted as part of the plan implementing a national Standard. Both the rules and regulations and the State standards are permissible as long as the standards are as strict or stricter than the national ones. There is nothing in the Act about variances from *State* laws which have not been submitted to the federal EPA as part of a plan implementing a *national* Air Quality Standard. It is still likely, though, that a State might submit an implementation plan providing for attainment of stricter State standards. Variances from this plan would have to be treated as revisions of the plan under the Act.

C. EXTENSIONS OF SECONDARY SULFUR OXIDE STANDARDS COMPLIANCE TIME

1. *Requirements of the Act and Guidelines*

Though it does not appear in the Act or the "Extensions" section of the Guidelines, there is another exemptions provision written into the regulations. Section 420.13(b)(1) states:

> "In any region where the degree of emission reduction necessary for attainment and maintenance of a secondary standard for sulfur oxides can be achieved through the application of reasonably available control technology, "reasonable time" for attainment of such secondary standard . . . shall be not more than 3 years unless the State shows that good cause exists for postponing application of such control technology."

This language requires, in effect, that an implementation plan for the Secondary sulfur oxide Standards in a given region must provide for the attainment of those Standards in three years and then describes the conditions under which exemptions may be granted:

> –"Reasonably available control technology" is not available; or
>
> –"good cause" can be shown why reasonably available control technology should not be applied, until some later time.

The length of the extension beyond three years depends

> "...on the degree of emission reduction needed for attainment of such secondary standard and on the social, economic, and technological problems involved in carrying out a control strategy adequate for attainment and maintenance of such secondary standard." (section 420.13(b)(2))

There will inevitably be strong pressure to postpone compliance time for the Secondary sulfur oxide Standards. These are the only Secondary Standards, other than those for particulates, that are stricter than the Primary Standards, and according to some industries the cost of controlling sulfur oxide emissions jumps substantially between Primary and Secondary Standards.[29]

[29] This is particularly true, at least ostensibly, of the copper smelting industry, and some see this extension, which is a gaping hole in comparison to the other exemptions allowed by the Act, as a response to pressure from that quarter. Just what the actual costs to the copper industry will be is hotly disputed. EPA pegs the figure at under $100 million for the entire industry; one copper company says more than one billion and threatens dire foreign trade consequences. A manufacturer of sulfur dioxide control technology, Chemical Technology Corporation of El Monte, California, claims that EPA is correct, and the copper companies wrong.

Considerable vigilance will be necessary, since the conditions imposed on exemptions by the Guidelines are extremely mild. "Reasonably available control technology" is defined as devices or procedures that will attain the emission limitations suggested in Appendix B, but with the provision that states are encouraged to consider "the social and economic impact of such emissions limitations." (section 420.01(o)(1)) This leaves wide latitude for postponement, since a practical, physically available, but expensive, device permitting attainment of a Secondary Standard in three years could be deemed "not reasonably available" because its "economic impact" could be too great.

No matter how presented, such an argument ultimately means that a company does not want to pay what it costs to clean up by the required time. Work out the numbers. Ask at what time after three years the device will become "reasonably available". That is, over how many extra years does the company want to spread the cost before it is willing to say it can afford the device? Assess the argument carefully; in some cases it is justified, particularly for smaller companies that are reasonably efficient but might be forced into drastic cutbacks if forced into immediate use of highly expensive devices. In some cases, much less expensive but equally effective devices may become available after a short wait and might justify delays. But don't sit still for economic impact arguments from big companies that can afford to clean up no matter what they say, or from marginal operations that are profitable only because they pay no operating costs for the scarce clean air they pollute.

"Good cause" could mean anything. Don't give up without a fight.

To add insult to injury, the criteria the Guidelines use for determining the length of a postponement are the same "economic, social and technical considerations" that can determine the need for the extension in the first place. Analyze cost arguments carefully. Reduce them to the essentials of who is not willing to pay how much, and make these public. You may not be able to prevent a postponement, but you should try to keep it within specific limits. Press also for a condition like that set for two-year extensions of primary Standard compliance time – application of the best possible interim control measures.

APPENDIX A

NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

Pollutant	Primary Standard	Secondary Standard
Sulfur Oxides:	(a) 80 micrograms per cubic meter (0.03 p.p.m.) – annual arithmetic mean.	(a) 60 micrograms per cubic meter (0.02 p.p.m.) – annual arithmetic mean.
	(b) 365 micrograms per cubic meter (0.14 p.p.m.) – maximum 24 hr. concentration not to be exceeded more than once per year.	(b) 260 micrograms per cubic meter (0.1 p.p.m.) – maximum 24 hr. concentration not to be exceeded more than once per year, as a guide to be used in assessing implementation plans to achieve the annual standard.
		(c) 1,300 micrograms per cubic meter (0.5 p.p.m.) – maximum 3 hour concentration not to be exceeded more than once a year.
Particulate Matter:	(a) 75 micrograms per cubic meter – annual geometric mean.	(a) 60 micrograms per cubic meter – annual geometric mean, as a guide to be used in assessing implementation plans to achieve 24-hour standard.
	(b) 260 micrograms per cubic meter – maximum 24 hr. concentration not be exceeded more than once a year.	(b) 180 micrograms per cubic meter – maximum 24-hr concentration not to be exceeded more than once a year.
Carbon Monoxide:	(a) 10 milligrams per cubic meter (9 p.p.m.) – maximum 8 hr. concentration not to be exceeded once a year.	Same as Primary Standard.
	(b) 40 milligrams per cubic meter (35 p.p.m.) – maximum 1-hr. concentration not to be exceeded more than once a year.	
Photochemical Oxidants:	160 micrograms per cubic meter (0.08 p.p.m.) – maximum 1 hr. concentration not to be exceeded more than once per year.	Same as Primary Standard.
Hydrocarbons:	160 micrograms per cubic meter (0.24 p.p.m.) – maximum 3 hr. concentration (6 to 9 a.m.) not to be exceeded more than once per year.	Same as Primary Standard.
Nitrogen Dioxide:	100 micrograms per cubic meter (0.05 p.p.m.) – annual arithmetic mean.	Same as Primary Standard.

Note: All measurements of air quality are corrected to a reference temperature of 25°C. and to a reference pressure of 760 millimeters of mercury (1,013.2 millibars).

APPENDIX B

1.0 *Definitions.*

1.1 "Air pollutant" shall mean dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substances, or any combination thereof.

1.2 "Air pollution" shall mean the presence in the outdoor atmosphere of one or more air pollutants in such quantities and duration as is or tends to be injurious to human health or welfare, animal or plant life, or property or to interfere with the enjoyment of life or property.

1.3 "Director" shall mean the Director of the State Air Pollution Control Agency or local air pollution control agency.

1.4 "Emission" shall mean the act of releasing or discharging gases containing air pollutants into the ambient air from any stack or source.

1.5 "Existing source" shall mean any stationary source other than a new source.

1.6 "Modification" shall mean any physical change to or change in the method of operation of a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

1.7 "New source" shall mean any stationary source, the construction or modification of which is commenced after publication of any proposed regulations which will be applcable to such source. Any equipment, the use of which will result in emission of air pollutants, which is moved to another premise involving a change of address, or purchased and to be operated by a new owner, or when a new lessee desires to operate such equipment after the effective date of these regulations shall be considered a new source.

1.8 "Opacity" shall mean a state which renders material partially or wholly impervious to rays of light and causes obstruction of an observer's view.

1.9 "Open burning" shall mean the burning of any matter in such a manner that the products of combustion resulting from the burning are emitted directly into the ambient air without passing through an adequate stack or flare.

1.10 "Particulate matter" shall mean any material, except water in uncombined form, that is or has been airborne and exists as a liquid or a solid at standard conditions.

1.11 "Person" shall mean any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this State, any other State or political subdivision or agency thereof or any legal successor, representative, agent, or agency of the foregoing.

1.12 "Ringelmann chart" shall mean the chart published and described in the U.S. Bureau of Mines Information Circular 8333.

1.13 "Source" shall mean any property, real or personal, which emits or may emit any air pollutant.

1.14 "Stationary Source" shall mean any building, structure, facility or installation which emits or may emit any air pollutant, and which does not, in its day to day operation, move.

2.0 *Permits.*

2.1 *Application For Permits to Construct.*

2.1.1 No person shall construct or install, or cause the construction or installation of any new source or any new facility intended to control the emission of air pollutants from any existing source without applying for and obtaining a construction permit from the Director.

2.1.2 Separate applications shall be required for each new source to be constructed and each facility to be installed, and shall be made by the owner or operator of the source on forms furnished by the Director.

2.1.3 Each application shall be signed by the applicant, which signature shall constitute an agreement that the applicant will assume responsibility for the construction of such source or facility in accordance with applicable rules and regulations.

2.1.4 Each application shall be accompanied by siting information; descriptions of the equipment and processes involved; the nature, source and quantity of uncontrolled and controlled emissions; the type, size and efficiency of control facilities; and such other information as the Director may require.

2.2 *Standards for Granting Construction Permits.* No construction permit shall be granted until the applicant shows to the Director's satisfaction that:

(a) The new source or control facility for which the permit is requested will operate in accordance with applicable rules and regulations.

(b) Such new source or control facility will operate without preventing or interfering with attainment or maintenance of any applicable ambient air quality standard.

(c) Such new source is equipped with instrumentation to monitor and record emission data or other information about the operation of the source which satisfies the requirements of § 3.0.

(d) Such control facility constitutes, and such new source incorporates, the best available control technology.

2.3 *Action on Applications for Construction Permits.*

2.3.1 The Director shall, within 60 days of the receipt of an application, notify the applicant in writing of his approval, conditional approval or denial of the application.

2.3.2 The Director shall briefly set forth in any notice of approval, conditional approval, or denial, the reasons for his decision.

2.3.3 The Director may impose any reasonable conditions upon an approval, including conditions requiring new sources to be provided with:

(a) Sampling ports of a size, number and location as the Director may require, and

(b) Safe access to each port.

2.4 *Cancellation of Construction Permits.*

2.4.1 The Director may cancel a construction permit if

(a) The construction or installation the permit approves is not begun within one year from the date of issuance; or,

(b) During construction or installation, work is suspended for one year.

2.4.2 The Director shall cancel a construction permit if

(a) He determines that any one of the Standards under § 2.2 or conditions under § 2.3.3 have been or will be violated; or

(b) Prior to construction or installation, more effective control measures become available.

2.5 *Application for Permits to Operate.*

2.5.1 No person shall operate or cause the operation of a source without applying for and obtaining a permit to operate from the Director in accordance with the requirements of this section.

2.5.2 Application for a permit to operate a new source shall be made at least 90 days prior to start up of operation.

2.5.3 Application for a permit to operate an existing source, as required by § 2.6.1, shall be made as soon after the effective date of any applicable rules and regulations as such source is in compliance with such rules and regulations, but in no case later than three months after such effective date.

2.5.4 Application for a conditional permit to operate an existing source, as required by § 2.6.2, shall be made at the time of submittal to the Director of a control plan and schedule of compliance under § 7.0.

2.5.5 Separate applications shall be filed for each source, and shall be made by the owner or operator of the source on forms furnished by the Director.

2.5.6 Each application shall be signed by the applicant, which signature shall constitute an agreement that the applicant will assume responsibility for operating such source in accordance with applicable rules and regulations.

2.5.7 Each application shall be accompanied by siting information; descriptions of the equipment and processes involved; the nature, source and quantity of uncontrolled and controlled emissions; the type, size and efficiency of control facilities; and such other information as the Director may require.

2.6 *Standards for Granting Permits to Operate.*

2.6.1 The Director shall grant a permit to operate a source if he determines that

(a) The source is in compliance with applicable rules and regulations.

(b) The source operates without preventing or interfering with the attainment or maintenance of any applicable National Air Quality Standard.

(c) The source is equipped with instrumentation to monitor and record emission data or other information about the operation of the source which satisfies the requirements of § 3.4.

(d) Any new source for which the permit is requested, or any control facility installed in an existing source for which the permit is requested, meets the standards and conditions imposed in the applicable construction permit.

(e) An emergency abatement plan for the source, as required by 42 CFR Part 420, has been federally approved or will be submitted for federal approval as required by 42 CFR § 420.16 (f).

(f) Performance tests, conducted after the application was made, at the applicant's expense, in accordance with methods prescribed by the Director and with, if requested, his observation and participation, demonstrate that the source is in compliance with applicable rules and regulations.

2.6.2 The Director shall grant a conditional permit to operate to any existing source that has submitted and had approved by the Director a control plan and schedule of compliance in conformance with the require-

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ments of §7.0.

2.7 *Action on Applications for Permits to Operate.*

2.7.1 The Director shall act within 60 days after start up of operations on an application for a permit to operate a new source, or within 60 days of receipt of an application for a permit (other than a conditional permit) to operate an existing source, and shall notify the applicant in writing of his approval, conditional approval or denial of the application.

2.7.2 The Director shall set forth in writing his reasons for approval, conditional approval, or denial of the permit.

2.7.3 The Director may impose any reasonable conditions on any permit to operate.

2.7.4 The Director shall act on applications for conditional permits to operate existing sources in the order of the sources' total yearly emissions, beginning with the largest emitter first.

2.8 *Suspension or Revocation of Permit to Operate.*

2.8.1 The Director may suspend or revoke a permit to operate if he determines that any of the conditions or standards of §2.6 or §2.7.3 have been violated.

2.8.2 Suspension or revocation of a permit to operate shall be final 10 days after service of notice on the holder of the permit.

2.8.3 A permit to operate which has been revoked shall be surrendered forthwith to the Director.

2.9 *Transfer of Permit to Operate:* The holder of a permit to operate may not transfer it without the prior written approval of the Director.

2.10 *Revisions of Permits.* Any permit issued by the Director shall be subject to revision in response to changes in applicable rules and regulations or other factors affecting the compliance of the source or control facility with the standards or conditions of the original permit.

2.11 *Exemptions.* Permits for construction or operation shall not be required for:

(a) Air pollutant detectors or recorders, combustion controllers or shutoffs;

(b) Air conditioning or ventilating systems not designed to remove air pollutants generated by equipment;

(c) Fuel burning equipment for indirect heating and for heating and reheating furnaces using gas exclusively with a capacity of less than 50 million Btu per hour input;

(d) Other fuel burning equipment for indirect heating with a capacity of less than one million Btu per hour input;

(e) Mobile internal combustion and jet engines, marine installations, and locomotives; and,

(f) Laboratory equipment used exclusively for chemical or physical analysis.

2.12 Possession of a permit to construct or operate shall not relieve any person of the responsibility to comply with applicable emission limitations or other regulations or other provisions of State law.

3.0 *Source Monitoring, Record Keeping and Reporting.*

3.1 The Director shall require the owner or operator of all stationary sources to establish and maintain records, make reports, install, use, and maintain monitoring equipment and methods, sample emissions and provide other information as required under §§3.4 and 3.6.

3.2 Records and reports shall be made on forms specified by the Director and shall be signed by the corporate President, or Vice President reporting directly to the President, or highest ranking corporate officer with offices located in the State; or by an equivalently responsible officer in the case of organizations other than corporations. Such signature shall constitute personal affirmation that the records or reports are true and complete, complying fully with applicable State requirements, and shall subject the responsible official to liability under §§10.1 and 10.2 of these rules for false or misleading statements.

3.3 Records required to be made of any aspect of the operation of a source shall be made and reported in the same units as any rules and regulations applicable to such aspect.

3.4 A photoelectric or other type smoke detector and recorder shall be installed, operated and maintained. Instruments for the continuous monitoring and recording of emissions of sulfur dioxide and nitrogen oxides shall be installed, operated and maintained. Data from such devices shall be kept current in a form allowing easy inspection, and shall be retained for three years.

3.4.1 Sulfur dioxide and oxides of nitrogen emission data shall be averaged every hour. Hourly averages shall be summarized every 24-hour period, and summaries and hourly averages shall be submitted to the Director every four months.

3.4.2 Particulate matter emissions shall be sampled and hourly data compiled. Hourly data shall be summarized every 24-hour period, and summaries and hourly averages submitted to the Director every four months.

3.4.3 Visible emissions shall be measured continuously and records kept indicating average hourly opacity and total minutes per hour in which stack discharge effluent exceeds 20 percent opacity. Hourly data shall be summarized monthly and summaries and hourly data submitted to the Director every four months.

3.4.4 The sulfur content of fuels, as burned, except natural gas, shall be determined in accordance with current recognized ASTM procedures. Daily and monthly averages shall be submitted to the Director every four months.

3.5 Within 10 days of receipt of a written request from any interested party, the Director shall acquire and make public the recorded hourly emission or other monitoring data from any source for a period of four or fewer days.

3.6 The Administrator may require the submission of any information other than records or reports of monitoring data as he deems fit.

3.7 In the case of shutdown of any monitoring device or method, intent to shut down such device or method shall be reported to the Director at least 24 hours in advance.

3.8 The Director shall be notified immediately of any breakdown or failure to operate of any monitoring device or method.

3.9 The Administrator or his authorized representative, upon presentation of his credentials,

(a) shall have right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under this regulation are located, and

(b) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method and sample any emissions which the owner or operator of such source is required under this regulation to sample.

3.10 Upon request of the Director, the person responsible for the source to be tested shall provide necessary holes in stacks or ducts and such other safe and proper sampling and testing facilities, exclusive of instruments and sensing devices, as may be necessary for proper determination of the emissions of air pollutants.

4.0 *Public Availability of Information.*

4.1 Any record, reports or other information obtained by the Director shall be made available to the public, except that upon a showing satisfactory to the Director by any person that such records, reports or other information, or particular part thereof (other than emission data), if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Director shall consider such record, report or information, or particular part thereof confidential, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the State concerned with carrying out this Act or when relevant in any proceeding under this regulation.

4.2 Any emission data made public by the Director shall be presented in such a manner as to show the relationship between measured amounts of emissions and the amounts of such emissions allowable under applicable emission limitations and compliance schedules, or other measures.

5.0 *Malfunction of Equipment; Reporting.*

5.1 In the case of shutdown of air pollution control equipment for necessary scheduled maintenance, the intent to shut down such equipment shall be reported to the Director at least twenty-four hours prior to the planned shutdown. Such prior notice shall include, but is not limited to the following:

(a) Identification of the specific facility to be taken out of service as well as its location and permit number.

(b) The expected length of time that the air pollution control equipment will be out of service.

(c) The nature and quantity of emissions of air contaminants to occur during the shutdown period.

(d) Measures such as the use of off-shift labor and equipment will be taken to minimize the length of the shutdown period.

(e) The reasons that it would be impossible or impractical to shut down the source operation during the maintenance period.

5.2 In the event that any emission source, air pollution control equipment, or related facility breaks down in such a manner as to cause the emission of air contaminants in violation of this article, the person responsible for such equipment shall immediately notify the Director of such failure or breakdown and provide a statement giving all pertinent facts, including the estimated duration of the breakdown. The Director shall be notified when the condition causing the failure or breakdown has been corrected and the equipment is again in operation.

6.0 *Prohibition of Air Pollution.* No person shall cause or permit air pollution, as defined in §1.2 of this

part, in excess of applicable emission standards, except pursuant to an approved schedule of compliance.

7.0 *Compliance Schedules.*

7.1 Except as otherwise specified, compliance with the provisions of these regulations shall be according to the following schedule:

(a) All new sources shall comply as of the start up of operation.

(b) All existing sources shall comply as soon as possible after the effective date of applicable rules and regulations, but in no case later than six months after such effective date, unless the owner or person responsible for the operation of the source shall have submitted to the Director a control plan and schedule for achieving compliance, such plan and schedule to contain a date on or before which compliance will be attained and such other information as the Director shall require.

7.2 The Director shall approve such a plan and schedule if he determines that:

(a) The source can not comply within six months, even using the best available control technology, or cannot install such technology within six months.

(b) Adherence to such plan and schedule will not jeopardize the attainment or maintenance of a National Standard by the required time.

(c) The plan and schedule provide for the earliest possible compliance by the source.

(d) The compliance date is no longer than three years after the effective date of applicable rules and regulations.

(e) The plan and schedule provide for interim control measures to be taken before the compliance date.

7.3 If the Director rejects a plan and schedule, the source must comply within six months, unless the Director approves a different plan and schedule.

7.4 The Director shall require persons operating under an approved plan and schedule to submit subsequent periodic reports on progress in achieving compliance.

8.0 *Enforcement.*

8.1 *Operating or Construction without a Permit.* No person shall:

(1) operate or cause the operation of a source without an operating or conditional operating permit; or,

(2) begin construction or cause the construction of a source without a construction permit; or,

(3) fail to submit or cause the failure to submit all required data to support its application for such permit.

8.2 *Failure to Submit or Carry Out an Emergency Plan.* No person shall:

(1) fail to submit or cause the failure to submit an emergency plan of abatement;

(2) fail to implement or cause the failure to implement such plan during any stage of an emergency episode declared by the Director.

8.3 *Operating a Source Without Pollution Control Devices.* No person shall operate or cause the operation of a source without using installed emission control devices, processes, or fuels, except in compliance with §5 of these regulations.

8.4 *Violation of an Applicable Emission Limitation or Schedule of Compliance.* No person shall violate or cause the violation of an applicable emission limitation, schedule of compliance, or other provision of the State implementation plan.

9.0 *Civil Liability.*

9.1 Whenever the Director finds, based on any information, that there is probable cause to believe a source is in violation of §§ 6.9, 8.1, 8.2, 8.3, or 8.4 of these regulations, he shall:

(1) issue an abatement order, which shall take effect upon ten days' notice to the affected source owner; or,

(2) file a civil suit for an injunction in the_____Court; and/or,

(3) file a civil suit for a fine in the_____Court.

9.2 Suits for such injunction or fine shall take precedence over all other cases on the docket of the_____ Court.

9.3 *Fines.* [The following provisions are written to suggest possible alternative fine structures. A group might want to support several or only one.]

9.3.1 Civil fines for violation of an applicable emission limitation or fuel content control, or for failure to obtain an operating or conditional operating permit, or causing air pollution under §6.0 shall be assessed in proportion to:

(a) the total quantity of pollutant(s) emitted in excess of applicable emission limitations and/or schedule of compliance during the period of violation; or,

(b) a professionally reasonable estimate of the total excess quantity of emissions based upon standard engineering process-weight calculations during the period of violation; or,

(c) the quantity of energy produced, in terms of Btu per unit of fuel burned, times the quantity of fuel burned; or,

(d) with respect to violations of applicable fuel sulfur content limitations, the excess quantity of sulfur contained in the fuel burned by the source over the period of violation.

9.3.2 In the absence of any showing by the State under §9.3.1 of the excess emissions, or of the excess sulfur content of fuel burned by the source, the fine shall be $500 per day of violation; provided, that the source owner may show, in mitigation, using any of the methods described in §9.3.1, that the excess emissions or excess sulfur in fuel burned by the source were so minimal that a lesser fine would be in the interest of justice.

9.3.3 Civil fines for operating a source without pollution control devices, for failure to implement an emergency plan of abatement, or constructing a source without a construction permit shall be $10,000 per day of violation.

9.3.4 Civil fines for failure to submit an emergency plan of abatement or for violating any provision of an implementation plan not covered under §§9.3.1, 9.3.2, 9.3.3, shall be $500 per day of violation.

10.0 *Criminal Liability.*

10.1 Any corporate officer, or other responsible official,

(1) who signs a report to the (State) Air Pollution Control Agency, emission monitoring record, or other record related to compliance with an applicable emission controls, compliance schedule or pollution tax which contains false or misleading information or statements; or

(2) who alters, falsifies, or causes the alteration or falsification of any such report or record;

shall be subject to a criminal fine of not more than $10,000, and imprisonment for not less than 6 months nor more than 2 years.

10.2 Such fines shall not be reimbursed by any corporation or source owner, subject to the same criminal penalties.

11.0 *Citizen Enforcement.*

11.1 Any citizen may obtain an injunction in the_____Court against any person (including business associations and other organizations) who violates an applicable emission limitation or schedule of compliance; fails to pay an applicable pollution tax; or violates any other provision of the State implementation plan. Suit may be commenced upon 30 days' notice to the affected party and the Director.

11.2 Any citizen may obtain an injunction in the_____Court against the State Pollution Control Agency for violating any provision of the State implementation plan. Suit may be commenced upon 30 days' notice to the Director.

11.3 Such cases shall receive priority over all other cases on the civil docket of the_____Court.

11.4 *Costs and Fees.* The_____Court, in issuing any final order in an action brought pursuant to §9, shall award costs of litigation (including reasonable attorney and expert witness fees) to citizens or citizen groups in cases where they successfully maintain an action pursuant to §9. The Court may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

11.5 Any citizen who supplies information on which a successful suit for a civil fine is brought under §9 of these regulations shall receive _____percent of the amount of the fine.

[Sections 8-11 suggest provisions we feel would implement a good enforcement system. Where they are not presently authorized by State law, they could not, of course, be adopted by your State agency as part of its implementation plan.]

APPENDIX C
FIRMS CONTRACTED TO WORK WITH STATES ON IMPLEMENTATION PLANS

Firm:	Working on *Emissions Inventory* for:	Working on *Plan Development* for:
Battelle Memorial Inst. 505 King Avenue Columbus, Ohio 43001 (614) 295-8054 Contact: Dr. Phillip Sticksel	Montana, Indiana	Indiana, Arizona
T.R.W. Systems 7600 Colshire McLean, Virginia 22101 (703) 893-2000 ext: 2307 Contact: Dr. Thomas Wright	Alaska, South Carolina, Alabama, Nevada	Alaska, Alabama, South Carolina
Pollution Research & Control Corporation 616 East Colorado Street Glendale, Califomia 91205 (213) 240-0515 Contact: Dr. Irwin Kauper	New Mexico, Idaho	Hawaii
Geomet, Inc. 326 East Montgomery Avenue Rockville, Maryland 20850 (310) 762-5820 Contact: Billy Weaver	Puerto Rico, Oklahoma	Puerto Rico, Oklahoma
GCA Corporation Burlington Road Bedford, Massachusetts 01730 (617) 275-9000 Contact: Raymond Fox	South Dakota, Wyoming, North Dakota	Idaho, Oregon, Washington
IBM Corporation 18100 Fredrick Pike Gaithersburg, Maryland 20760 (310) 840-4714 Contact: Thomas Lewis	Nebraska, Missouri, New Jersey	Nebraska, Louisiana, New Jersey, Nevada, Wisconsin, Virginia, New Mexico
Pedco-Environmentalists, Inc. Suite #8 Atkinson Square Cincinnati, Ohio 45246 (513) 771-4330 Contact: George Jutze	Kansas, Ohio	Kansas, Mississippi
Walden Research Corporation 359 Allston Street Cambridge, Massachusetts (617) 868-3940 Contact: Paul Morganstern	New Hampshire, Massachusetts	Rhode Island, Maine

Research Corporation of New England 210 Washington Street Hartford, Connecticut (203) 527-4101 Contact: Dr. Robert Hittler	Vermont, Minnesota	Vermont, New Hampshire, Minnesota
Radian Corporation 8409 Research Boulevard Austin, Texas 75758 (512) 454-9535 Contact: Dr. Scott Lagroan	Louisiana	Arkansas

APPENDIX D
EPA REGIONAL OFFICES

Region I
(New England States)

Room 2303
John F. Kennedy Federal Building
Boston, Massachusetts
(617) 223-7210
Director: John McGlennon

Region II
(New York, New Jersey, Puerto Rico)

Room 847
26 Federal Plaza
New York, New York 10007
(212) 264-2525
Director: Gerald M. Hansler

Region III
(Pennsylvania, Maryland, Delaware, West Virginia, Virginia)

P.O. Box 12900
Philadelphia, Pennsylvania 19108
(215) 597-4506
Director: Not Appointed Yet

Region IV
(Kentucky, Tennessee, N. Carolina, S. Carolina, Georgia, Mississippi, Alabama, Florida)

Suite 300
1421 Peachtree Street N.E.
Atlanta, Alabama 30309
(404) 526-5727
Director: John Ravan

Region V
(Wisconsin, Michigan, Illinois, Indiana, Ohio, Missesota)

33 E. Congress Parkway
Chicago, Illinois 60605
(312) 353-5350
Director: Francis T. Mayo

Region VI
(Louisiana, Arkansas, Oklahoma, Texas, New Mexico)
1114 Commerce Street
Dallas, Texas 75202
(214) 749-2827
Director: Not Appointed Yet

Region VII
(Kansas, Missouri, Nebraska, Iowa)
Room 702
911 Walnut Street
Kansas City, Missouri 64106
Director: Jerome Svore

Region VIII
(Montana, N. Dakota, S. Dakota, Wyoming, Colorado, Utah)
Lincoln Towers Building
1860 Lincoln Street
Denver, Colorado 80203
Director: John Green

Region IX
(Arizona, Nevada, California, Hawaii)
760 Market Street
San Francisco, California 94102
(415) 556-5876
Director: Paul DeFalco

Region X
(Alaska, Washington, Oregon, Idaho)
Room 501 Pittock Block
921 S.W. Washington Street
Portland, Oregon 97205
(503) 226-3914
Director: James L. Agee

APPENDIX E
BIBLIOGRAPHY

Government Publications:

1. The Clean Air Act (42 U.S.C. 1857 et. seq.)

2. EPA, "The National Primary and Secondary Ambient Air Quality Standards" 42 Code of Federal Regulations, Part 410, 36 Federal Register 8186 (April 30, 1971)

3. EPA, "Requirements For Preparation, Adoption, And Submittal Of Implementation Plans" (Federal Guidelines) 42 Code of Federal Regulations, Part 420, 36 Federal Register 15486 (August 14, 1971)

   [The above documents can be ordered through:
   Environmental Protection Agency
   Office of Public Affairs
   Publications Unit
   5600 Fishers Lane, Room 17B–31
   Rockville, Maryland 20852
   (301) 443-4050
   They are available free of charge. In quantities of over 10, however, there is a waiting period of about two weeks.]

4. Senate Committee on Public Works, "National Air Quality Standards Act of 1970", *Sen. Rpt.* No. 91-1196, 91st Cong., 2nd Sess. (1970)
   [The above document can be ordered from the Committee itself:
   Committee on Public Works
   4202 New Senate Office Building
   Washington, D.C. 20510
   It is free of charge, but available in limited amounts only. It can also be ordered from the Government Printing Office.]

5. Air Quality Criteria Documents:

   - Carbon Monoxide, GPO No. HE 20.1309:62
   - Photochemical Oxidants, GPO No. HE 20.1309:63
   - Hydrocarbons, GPO No. HE 20.1309:64
   - Nitrogen Oxides, GPO No. EP 4. 9:84
   - Particulate Material, GPO No. FS 2.93/3:49
   - Sulfur Oxides, GPO No. FS 2.93/3.50

6. Control Technique Documents:

   - Particulate Air Pollutants, GPO No. FS 2.93/3:51
   - Sulfur Oxides GPO No. FS 2.93/3.52
   - Carbon Monoxide Emissions From Stationary Sources, GPO No. HE 20.1309:65
   - CO, NO_x, And Hydrocarbons Emissions From Mobile Sources, GPO No. HE 20.1309:66
   - Nitrogen Oxide Emissions From Stationary Sources, GPO No. HE 20.1309:67
   - Hydrocarbon And Organic Solvent Emissions From Stationary Sources, GPO No. HE 20.1309:68

7. Report of the Administrator of the Environmental Protection Agency, "The Economics of Clean Air," *Sen. Rpt.* No. 92-6, 92nd Cong., 1st Sess. (1971)

[These documents are available from the Government Printing Office:
Superintendent of Documents
Government Printing Office
Washington, D.C. 20402

There is a $1.00 charge for each copy requested.]

8. *Guide for Air Pollution Episode Avoidance,* AP 76.

9. *Guide for Control of Air Pollution Episodes in Medium-Sized Urban Areas,* AP 77.

10. *Guidelines: Air Quality Surveillance Networks,* AP 98.

[The AP series of reports is issued by the Office of Air Programs, Environmental Protection Agency, to report the results of scientific and engineering studies, and information of general interest in the field of air pollution. Information reported in this series includes coverage of Air Program intramural activities and of cooperative studies conducted with State and local agencies, research institutes, and industrial organizations. Copies of AP reports are available free of charge to federal employees, current contractors and grantees, and non-profit organizations as supplies permit, from the Office of Technical Information and Publications, Office of Air Programs, Environmental Protection Agency, P.O. Box 12055, Research Triangle Park, North Carolina 27709. Others may purchase copies from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.]

Other Publications:

1. *Air Pollution Primer,* National Tuberculosis and Respiratory Disease Association, 1969 – A clear, concise introduction to the problem of air pollution.
[Order from your local T B & R D Association. Copies are free of charge.]

2. *Your Right to Clean Air,* Conservation Foundation (August, 1970). This edition includes valuable sections on organizing a citizen clean air coalition and holding meetings and workshops, which are not in the new edition.

3. *Your Right to Clean Air,* Conservation Foundation, (August, 1971). [A limited number of these pamphlets are available from the Conservation Foundation, 1717 Massachusetts Avenue, N.W., Washington, D.C. 20036. Remember to specify which editions you want.]

4. *Air Pollution Workbook,* Scientists' Institute for Public Information, (1970). Lucid, short explanations of the atmosphere, characteristics of specific pollutants and biological effects of pollution.
[Order from: Scientists' Institute for Public Information, 30 East 68th Street, New York, New York 10021. Available at $1.00 per copy.]

5. *State Air Pollution Control Laws,* Stanley Degler, BNA's Environment Management Series, 1970 – Summaries of State laws, the full text of the California law, and a model law put out by the Council of State Governments.

APPENDIX F
SAMPLE LETTER REQUESTING ASSESSMENT OF STATE LEGAL AUTHORITY TO CREATE AND ENFORCE IMPLEMENTATION PLAN

Governor _____
State Capitol
_____

Dear Governor _____:

On February 16, 1971, U.S. Environmental Protection Agency Administrator William D. Ruckelshaus advised all Governors by letter of the State's important new responsibilities under the federal Clean Air Amendments of 1970.

One action he described as "essential" was "to make a prompt determination as to whether new State legislation will be needed to enable your State to formulate and carry out implementation plans meeting the requirements of the Act."

It is important that a review of existing legislation be undertaken soon, since plans must be submitted by late January, 1972, and since an acceptable plan must demonstrate that adequate State authority exists at the time it is submitted. Under the Act, if a State submits an unacceptable plan, the Administrator of the federal EPA must implement his own. It is thus of crucial importance that State officials have and exercise the authority listed by Mr. Ruckelshaus in his letter.

_____ *(Name of your organization)* _____ is concerned that federal air quality legislation be energetically enforced. We would appreciate receiving a copy of your evaluation of _____ *(your State's)* _____ statutory authority in response to Mr. Ruckelshaus' letter, and an indication of what action is being taken to correct any inadequacies.

Thank you for your cooperation.

Copies to:
State Attorney General

Director, State Air Pollution
Control Agency

APPENDIX G
CHECKLIST OF REQUIRED STATE LEGAL AUTHORITY

1. Authority to adopt emission standards and limitations and any other measures necessary (e.g., limitations on the sulfur content of fuels) for attainment and maintenance of National Ambient Air Quality Standards.

2. Authority to enforce without delay applicable laws, regulations, and standards, with appropriate sanctions including authority to seek injunctive relief.

3. Authority to abate pollutant emissions on an emergency basis to prevent substantial endangerment to public health, i.e., authority comparable to that available to the Environmental Protection Agency under Section 303 of the Clean Air Act, as amended.

4. Authority to prevent construction, modification, or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a National Standard.

5. Authority to obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require record-keeping and to make inspections and conduct tests of air pollution sources.

6. Authority to require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also, authority to make such data available to the public as reported and as correlated with any applicable emission standards.

An implementation plan approvable under the Clean Air Act, as amended, must show these authorities are immediately available to the State agency or agencies directly responsible for developing and carrying out such plans. The authorities described may be provided by specific or general legislation, and must be applicable to the entire State.

[This list is adapted from one sent with a letter from EPA Administrator Ruckelshaus to all the State Governors in early 1971. We have revised the original to account for changes in the final Guidelines. Authority was originally required to establish permit systems, to inspect auto emissions and to institute land use and transportation controls. The permit requirement was cut entirely, and states must now submit timetables for acquiring auto inspection and land use and transportation control authority.]

APPENDIX H
THE NATIONAL ENVIRONMENTAL POLICY ACT

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I
DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may–

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the presevation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall–

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment:
(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, minicipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II
COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest dryland, wetland, range, urban, suburban, and rural environment; (2) current and forseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation, (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultats as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of this title 5, United States Code (but without regard to the last sentence thereof).

Sec. 204. It shall be the duty and function of the Council–

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authorative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205. In exercising its powers, functions, and duties under this Act, the Council shall–

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

Sec. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

BEST COPY AVAILABLE

ATTACHMENT 2

TRANSPORTATION CONTROLS

FOR CLEAN AIR:

A Manual for Citizen Participation In State Implementation Plan Proceedings Under The Clean Air Amendments of 1970

published by

Project on Clean Air
Natural Resources Defense Council, Inc.
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I. USING THIS MANUAL

On February 15, 1973, 17 States will submit to the U.S. Environmental Protection Agency (EPA) plans for controlling air pollution from motor vehicles in 27 major metropolitan areas across the country.[1] Prior to submitting their plans (known as transportation control strategies) to EPA the States must hold public hearings. This manual is designed to enable you to participate in these hearings and in the review of the plans which EPA will undertake after February 15.

The manual is the second handbook published by the Natural Resources Defense Council (NRDC) on State Air Quality Implementation Plans. Those of you familiar with *Action For Clean Air* (Sept. 1971) will note that small portions of that manual are repeated here in order to make this handbook as self-contained as possible.

Part II of this Manual discusses the most pertinent requirements of the Clean Air Act. Part III relates EPA's actions to date regarding State Implementation Plans. Part IV summarizes the alternative transportation control measures which can be employed to reduce motor vehicle pollution. Part V discusses the impact of the automobile on the urban environment. Part VI describes the general legal requirements for the form and content of transportation control portions of plans. Part VII discusses alternative transportation control measures in detail. Part VIII suggests the steps citizens can take to participate in the development of transportation control strategies. Part IX includes a list of National Ambient Air Quality Standards, a list of the cities where transportation controls are necessary, a timetable of further necessary action, a list of EPA Regional Transportation Control Representatives, and a bibliography.

Best of luck on your efforts for clean air!

David Hawkins (D.C.)
Cullen Phillips (N.Y.)

II. INTRODUCTION TO THE CLEAN AIR ACT

The transportation control strategies which must be submitted to EPA on February 15 are only one component of overall *Implementation Plans* required by the Clean Air Act to achieve national ambient air quality standards. The following summary of the Act's provisions regarding Implementation Plans will place the States' transportation strategies in the proper context.

A. *Air Quality Standards (Sections 108 and 109)*

The Clean Air Act requires EPA to set two types of *National Ambient Air Quality Standards*. *Primary Standards* were to be set at levels which are adequate to protect human health. These Standards must be achieved within three years of the approval of a plan implementing them (sometime in 1975 for most States). The *Secondary Standards* were to be set at levels to protect human "welfare" values. Congress intended these Standards to safeguard *all* values other than health, including visibility, plant and animal life, buildings and materials. Secondary Standards must be achieved within a "reasonable" time period, whose length is not specified. National Standards are expressed as permissible annual average concentrations, with short-term maximum concentrations which may occur only a certain number of times a year.

Standards for hydrocarbons, sulfur oxides, photochemical oxidants, carbon monoxide, particulates and nitrogen oxides were set on April 30, 1971 (they are listed at page 47). The Administrator must add to this list any other pollutant he finds dangerous to public health or

[1] The states are Alaska, Arizona, California, Colorado, Dist. of Columbia, Illinois, Maryland, Massachusetts, Minnesota, New York, Ohio, Oregon, Pennsylvania, Texas, Utah, Virginia, and Washington. See page 48 for a list of the specific cities.

welfare. Within one year after a pollutant has been listed, he must propose Standards for that pollutant and simultaneously issue Criteria and Control Documents. Proposed Standards must be made final after a 90-day comment period.

In effect, the Standards represent a federal ceiling on pollution. They are an effort to make pollution control uniform and to set adequate bases for abatement. They do not, however, prevent States from setting better standards. States are encouraged to set more stringent standards if they think their regions require them, or to protect regions with air quality already above the national Standards. This principle of "non-degradation" of presently pure regions has particularly strong support from Congress.

B. *Implementation Plans (Section 110)*

The Act requires each State to formulate an air pollution abatement plan for each air quality control region or part of one with the State boundaries. These *Implementation Plans* must set out in detail how the State intends to achieve and maintain the National Air Quality Standards in the required time. The Act requires one plan for meeting the Primary Standard and another for meeting the Secondary Standard, for each of the six pollutants, in each Air Quality Control Region (AQCR) in the State. (In practice, many of the plans will be combined in single documents.) All plans must be written, subjected to public hearings and submitted to the federal Environmental Protection Agency for approval by January 30, 1972. EPA must approve or reject each part of the plan within the next four months. Any plan or part of a plan takes effect upon approval. If no plan or an inadequate plan is submitted, EPA must put its own into effect within six months.

Early in April, 1971, EPA proposed federal Guidelines elaborating the requirements in Section 110 of the Act for the contents of implementation plans. These regulations were made final on August 14 and reprinted on November 25, 1971 (36 Fed. Reg. 22398).

The Act and Guidelines require implementation plans to include these elements:

—A demonstration that the State air pollution control agency has *adequate legal authority* to carry out the measures of the plan. All laws and administrative regulations needed (with two exceptions) must be in effect at the time the plan is submitted to EPA.

—A *control strategy*. This must include a *survey* of the region's existing air quality and a detailed *inventory* of the emissions from all pollution sources in the region to help determine what kind of air pollution problem exists and what must be done about it. The control strategy must set forth all the *measures* that will be taken to make the region's air quality conform to the National Standards. These measures must include emission limitations, saying how much pollutant each source can emit, and other control procedures, such as process changes, fuel controls, and *land use and transportation controls*, if they are necessary to meet the Standards. The control strategy must also include *timetables* for compliance with its control measures, and a *demonstration* that the control strategy will be adequate to meet the National Air Quality Standards in the required time.

—*Enforcement procedures* for making sure that the control strategy is followed.

—A *monitoring system*, including a network for sampling ambient air quality, and procedures for inspecting and monitoring emissions from each source of air pollution. Emission data must be reported to the State control agency, and these reports must be available to the public.

—*Emergency procedures* for dealing with high-pollution crises.

—*Procedures for reviewing*—and *stopping*, if necessary—construction of new air pollution sources, modification of existing ones, and operation of all sources to be sure that they will not interfere with meeting an Air Quality Standard on time.

—*Procedures for revising the plan* when it is found inadequate, when new control techniques are found, when new Air Quality Standards are set, or when the State wishes to grant a variance from the original control strategy.

—*Procedures for inter-governmental cooperation*, including measures to insure that pollution from one region will not interfere with achieving Air Quality Standards in another.

—*Procedures for inspecting used autos* to enforce compliance with the control strategy.

—A demonstration that the State will have *manpower* and *funding* adequate to implement the implementation plan.

The Act and Guidelines require States to hold public hearings on any plan or revision of a plan before it is submitted to EPA for approval. Prominent notice of the hearing must be given and a copy of the proposed plan made publicly available at least 30 days before the hearing date.

The Guidelines (section 51.3) also establish a classification system for AQCR's as Priority I, II or III regions, according to the severity of their pollution problems.

The Guidelines (section 51.7) also require submission of two series of reports beginning after a State's implementation plans are approved by EPA. Quarterly reports must contain information on current ambient air quality. Semiannual reports must describe current progress in carrying out the approved implementation plans and any revisions of rules, regulations or compliance schedules made in the plan.

C. *Extension Provisions (Section 110 of the Act, and Subpart C of the Guidelines)*

The Act and Guidelines provide for four different kinds of extensions:

—An 18-month extension of the deadline for submitting a plan implementing any National Secondary Air Quality Standard;

—A two-year extension of the time in which an air quality control region must comply with a National Primary Air Quality Standard;

—An extension of the time in which an air quality control region must comply with the National Secondary Air Quality Standard for sulfur oxides (the Act says the deadline must be a specified "reasonable time" after approval of the plan; the Guidelines say three years, but allow an extension of unspecified length if certain conditions are met);

—A one-year extension of the time in which certain sources must comply with certain measures of an implementation plan for either a Primary or a Secondary Standard.

All four extensions are subject to specific conditions and can only be granted by the Administrator of EPA.

III. EPA'S APPROVAL OF IMPLEMENTATION PLANS

All States submitted Implementation Plans by January 3, 1972 or shortly thereafter. On May 31, 1972, the Administrator of EPA announced his approval and disapproval of plans. He revealed that EPA had decided to give the States until February 15, 1973 to submit portions of plans dealing with transportation control measures. EPA's stated reason for this unauthorized delay was that the States needed more time to develop the data necessary to select between various transportation controls. A list of the States submitting transportation controls on February 15 is on page 48.

Also on May 31, 1972, EPA announced that it had granted extensions of the deadline for meeting the national standards from 1975 to 1977 to all States which requested extension if they showed that they needed transportation controls in order to meet the standards. A list of the States receiving two-year extensions on this basis is on pp.48-49. All of these extensions are being challenged by NRDC in the courts on the ground that it has not been demonstrated that these States cannot attain the standards by 1975.

IV. INTRODUCTION TO TRANSPORTATION CONTROLS

This section will briefly identify the basic measures which your State can consider to reduce emissions from mobile sources. A more detailed discussion of each control measure will follow in section VII. The federal government has taken over the control of emissions from new motor vehicles. Thus, the States (with the exception of California) are limited to controlling emissions from vehicles already on the road. The two methods of reducing emissions from these sources are (A) by reducing the number of vehicles on the road and (B) by reducing the amount each vehicle pollutes.

As will be discussed in section V, a major cause of our urban motor vehicle pollution problem is our excessive dependence on the automobile in our major metropolitan areas. The most meaningful control strategies will be the ones which attack this problem directly by a series of coordinated steps designed to improve mass and public transportation systems while at the same time restraining and restricting private automobile use in our most polluted areas.

Transit Improvements. The available short-term public transportation improvements include fare reductions, improved routing and scheduling of buses, establishment of exclusive or preferential bus lanes, creation of demand-responsive bus services, provision of shared taxis, and improvements of the walking and bicycling environment.

Vehicle Restraints. To encourage the development of these transit improvements and to assure greater use of public transportation, *vehicle restraints* of the following types must be adopted: bridge and road toll increases, parking restrictions, parking fee increases, auto-free zones, strong car-pooling programs, increased gasoline taxes, and moratoriums on highway construction.

Retrofits, Maintenance, and Inspection. Individual vehicle emissions can be reduced by equipping used vehicles with emission control devices (generally termed *retrofit* devices), by requiring that all vehicles receive specified *maintenance* on a regular basis, and by use of *emissions inspection programs* designed to determine whether the vehicles are properly equipped and maintained.

V. THE AUTO AND THE CITY: ADVERSE ENVIRONMENTAL EFFECTS

While under the Clean Air Act transportation control portions of Implementation Plans need only have the result of achieving cleaner air, it is clear that any measures which reduce vehicle traffic will also produce many other environmental benefits. The following discussion of the ills associated with present-day auto use will indicate the variety of problems which traffic reduction strategies can alleviate.

During the last fifty years while the population of the United States doubled, the number of automobiles on the road increased by a phenomenal *800%*. And just as the population distribution has shifted to our urban areas, automobile use has converged on the city. Today over 54% of total vehicle miles traveled (1.2 million annually) are within the urban areas that comprise less than 1% of the nation's total land area. These automobiles and trucks spew deadly pollutants into our air—97 million tons a year of carbon monoxide alone—and cause as much as 90% of the total pollution problems in major cities. Most urban area residents rely exclusively on the automobile for transportation, and our auto use is on the upswing.

The number of cars on the road increases at a steady rate of 3 to 4% a year. Already there's a car on the road for every two people in the U.S. The number of families with two or more cars increased 50% in the last ten years—and the number is growing at an even faster rate than families attaining their first car. Not only are there more cars on the road, but we use them more. The average number of miles driven per vehicle has increased steadily to over 10,000 miles a year; and the rate of gasoline consumption increases by about 5% annually.

The most disturbing statistics are those that reflect our driving patterns. Over half of all auto trips are for distances of less than five miles. The largest share of total auto travel is in

trips from home to work. Eighty-two percent of all commuting is done by automobile—usually by a driver traveling alone. Even where mass transit facilities are readily available (within ¼ mile's distance) 68% of the work force continues to use the automobile.[2]

Behind this amazing growth and increased reliance stands an investment of over $70 billion and 42,000 miles in paved super highways, over $90 billion in annual motor vehicle sales, a combined advertising effort of over $300 million, as well as accommodation and inducements in the form of large shopping malls surrounded by acres of parking space and drive-in facilities of every sort—banks, eating places, dry cleaners, even churches. But the automobile does not merely serve our transportation needs, it is a status symbol; linked with visions of freedom, speed, and power; advertised as an accoutrement to one's sexuality; and packaged to represent comfort and convenience.

Once encased inside this 2-ton machine, equipped to travel at racetrack speeds, one may be touched by a fleeting illusion of privacy, safety, power and freedom. But while this illusion persists, our driving practices belie it. One commentator was led to assert that the only place one ever sees a single car take the road is on T.V. Instead of an agent of power and freedom, the automobile has become a virtual prison for its owner every morning from 7 to 9—trapping him in lines of traffic moving at speeds of 5 to 7 miles per hour.

The scenery left on the highways between home and work, where most of our travel takes place, consists of factories, shopping centers, and other housing developments: the unaesthetic suburban sprawl that inevitably follows the construction of each new highway. And for all the added construction and the increased horsepower, automobile travel time continues to mount. It takes the average commuter in Washington 30 minutes to travel the last five miles into the city. In New York City even at off peak hours the roadways are filled to almost 90% capacity[3] and average speeds have declined steadily down to 5½ mph.[4]

The automobile is also the largest single killer of our nation's young people (17 to 25 years old). Although fatality rates, quoted in terms of deaths per miles traveled, declined slightly in the last year, overall deaths on the road continue to rise—now totaling over 55,000 fatalities annually.[5] The sight of cars piled up on the side of major turnpikes is a daily occurrence for the average commuter. On rainy days cities regularly deploy additional police cars and tow trucks to cover freeways during peak hours.

Although highway engineers tout statistics to show that high-speed turnpikes such as the Interstate System offer the safest driving conditions, only 20 percent of our travel actually takes place on those roads. The multi-lane freeways that link suburb and city, meanwhile, are filled to capacity—and as one transportation specialist noted, this saturation poses "a dangerous situation that only promises to get more dangerous."[6] The fatality rate is greater in densely populated areas: in cities with populations of one million and over the rate is 3.5 per 10,000 vehicles while the average for smaller communities is less than 2.5 deaths.

And while auto makers hail the "miracle" of mass production that has "lowered costs and placed auto ownership in reach of nearly every worker . . . to discover new freedom",[7] one-fourth of our population—the aged, handicapped, and poor—are outside the "reach" of automobile travel. They are virtually locked in the inner-city, and rendered immobile owing to

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[2] *1972 Automobile Facts & Figures*, Motor Vehicle Manufacturer's Assoc., p. 36.

[3] *Manhattan Auto Study*, sponsored by the City Club Research Foundation, December 1972, (draft), p. 2.

[4] Interview with Michael Walsh, New York City Air Resources Board, November 22, 1972.

[5] In comparison DOT officials report that the urban public transportation system is the safest way to travel—with fewer than 1,000 fatalities a year nationwide; the same DOT document states that the auto ranks last in safety and poses the greatest challenge to safety engineers.

[6] John Burby, *The Great American Motion Sickness*, Little, Brown and Company: Boston, (1971) p. 98. Quote from William Siefert, Massachusetts Institute of Technology.

[7] *1972 Auto. Facts & Figures*, *supra* n. 2 at p. 39.

the demise of mass transit services. A major complaint of the riot-torn Watts community was that "a worker had to leave home at 5:30 a.m., take five different buses and pay 73¢ to reach a Santa Monica aircraft factory for the 7:30 shift." The only means of transportation to the hospital was by taxi, at $10 round-trip, so "when a man in Watts complained he didn't feel well, the bitter question was whether he felt 'ten-dollars bad'."[8] Where municipal governments allow transit services to shrink, they not only foster reliance on the private automobile, but they effectively deny a significant proportion of the population the mobility other Americans enjoy.

Furthermore, the automobile is our least efficient means of transport in terms of energy consumption. The average occupancy rate of the automobile has dropped to 1.2 passengers. Studies have determined an ordinary bus in urban travel is almost six times as efficient as the automobile (traveling the equivalent of 40 passenger miles per gallon compared to 7 p.m. per gallon for the auto). Automobile travel consumes over 1/5 of our total energy supplies in the U.S.—almost all of this petroleum products, the energy resource now in shortest supply. Government studies, projecting that by 1980 we will need to import over 50% of our oil supplies, recommend that conservation measures be adopted with regard to automobile and truck travel to reduce our overall demand and avert an energy crisis.[9]

Finally, even though much of the cost of using automobiles is hidden, the direct costs are still astronomical. Over 1/3 of the average yearly family income is required to purchase a new car. In addition, Americans spend over $10 billion annually for automotive servicing (1/6 of the total sales for all service industries combined) and virtually one of every four dollars in retail sales in the country is spent on auto-related purchases (parts, fuel, accessories).

Indirect costs are also huge. The Department of Transportation estimated in 1970 that for every dollar the automobile owner spends, someone else spends 30¢—for policing, road maintenance, losses due to air pollution, etc. The courts, their dockets jammed, are devoting 57% of their time to cases involving automobiles. As early as 1959 a Philadelphia city official estimated that the city was subsidizing the individual auto-user to the tune of $50 per car per year—an amount equal to 8% of the city's general fund. In Manhattan, the economic loss to the community from congestion is estimated at over $1 billion annually.[10] The cost of trucking in New York City runs 60% above national levels, largely due to congestion; and this added expense for delivery of goods and services is eventually passed on to the consumer.

We have yet to determine the true amount of other hidden costs to society—in the form of lost land area, urban sprawl and the concomitant breakdown of the inner-city, and increased levels of noise and air pollution. Additional highway construction and parking areas deprive the community of needed land area and real estate and erode the property tax base. In New York City "more ground area in the Central Business District (37%) is devoted to [automobile] transportation than to any other activity."[11] Increased automobile and truck traffic during the day is generating higher noise levels which are not only annoying but actually injurious to our health.[12]

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[8] Burby, *supra* n. 6 at p. 126.

[9] *The Potential for Energy Conservation—A Staff Study*, October 1, 1972, Exec. Office of the President, Office of Emergency Preparedness, pp. ii ff.

[10] *Manhattan Auto Study*, *supra* n. 3 at p. 1 (draft).

[11] Id., p. 6

[12] The recent EPA report on noise found: "Of all the irritant noise sources in both urban and rural settings, traffic noise has been isolated as the most significant". Besides the effects of noise on our hearing ability, scientists know that at levels above 70 decibels there is an acceleration of heart rate, changes in breathing, and changes in the secretion of juices in the gastrointestinal tract. There is evidence of cardio-vascular ailments occurring from continued exposure to high noise levels. And lower levels result in psychological stress, increased irritability and anxiety. The automobile generates noise levels of 70 to 80 decibels at ranges of 50 feet and trucks produce levels as high as 95 decibels. (See EPA *Report to the President and Congress on Noise*, S. Doc. No. 92-63, 92nd Congress, 2d Sess. February, 1972.)

But perhaps the greatest impact from increased auto-use in the city, is the deterioration of our air quality. The table on the following page shows the overwhelming percentage of three major pollutants contributed by mobile sources in major U.S. cities. Although we know the automobile is the most significant contributor to air pollution in our urban centers, it is difficult to assess the extent of the damage. Auto pollutants kill trees and crops in the Los Angeles area and doctors there order 10,000 people a year to move to a city with cleaner air. In auto-congested cities there is enough carbon monoxide in the air at times to reduce the blood's oxygen-carrying capacity by twenty percent.[13] In Chicago carbon monoxide concentrations exceeded levels damaging to public health more than 22 percent of the time.[14]

Carbon monoxide (CO), the pollutant emitted in the largest concentrations in motor vehicle exhaust, affects humans by combining with hemoglobin in the blood stream—displacing the supply of oxygen being carried to the cells. In high concentrations, such as exposure to raw auto exhaust, CO poisoning is rapid and deadly. But even at lower concentrations which are not fatal, CO exposure is associated with headache, fatigue, shortness of breath, cramps, coughing, vomiting, loss of feeling in forearms, and other maladies.

Nitrogen oxide (NO_x), though emitted in much lower quantities in the exhaust stream, is technologically more difficult to control—and automobile exhaust accounts for 30% to 88% of the total NO_x emissions in our cities. Once released in the atmosphere nitrogen oxides combine with oxygen to form NO_2 which produces harmful effects on the lungs. Government studies have reported significant association between high NO_2 levels and the incidence of acute bronchitis among children and increased occurrence of acute respiratory disease at all ages.[15] Furthermore, these levels are exceeded in almost every U.S. city with populations over 500,000, and EPA reported that existing ambient concentrations of NO_2 are a "direct threat to general health".[16]

The most commonly observed effect of NO_x emissions, however, is when it combines with hydrocarbons (also present in automobile exhaust) in the presence of sunlight to form photochemical smog. This chemical reaction results in the formation of other dangerous pollutants: ozone and PAN (peroxy-acetyl nitrate). Ozone affects the function of the lungs, aggravates asthma, and can even reduce coordination. PAN is a severe eye irritant—the element in smog that causes stinging eyes and tearing. But these chemicals have an even more measurable effect on vegetation. Oxidants and hydrocarbons cause spinach to wither and have damaged crops of tobacco, beets, celery, and lettuce. The decline in citrus crop yields in Southern California has been attributed to smog from the Los Angeles area; and on the East Coast, damage to crops from smog is estimated at $18 million a year.[17]

Besides the dangers from CO, NO_x, and HC, there is mounting evidence of health hazards from lead emitted in automotive exhaust; this occurs when gasoline containing lead additives is used. Essentially all airborne lead results from automobile exhausts, contributing significantly to the lead concentrations found in humans. In high concentrations lead causes kidney disease, mental retardation, and death. Furthermore, a correlation has been found between existing levels of lead in the air and hyperactivity in children and brain damage in human fetuses. Although gasoline containing lead additives has recently come under federal regulation, critics charge that the proposed regulations are too little too late. The regulations apply chiefly to making non-leaded fuels available by 1974—to accommodate the introduction of 1975 model cars equipped with catalytic converters for emissions control. (This catalyst is

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[13] Burby, *supra* no. 6 at p. 79.

[14] Senate Report No. 91-1196, 91st Cong., 2d Sess., (1971), p. 1.

[15] HEW 1968-69 study in Chattanooga, Tenn. Cited in "Air Quality Criteria for Nitrogen Oxides," HEW, (1970) AP-84, p. 10-8.

[16] *Idem.*

[17] *Air Conservation*: The Report of the Air Conservation Commission of the American Association for the Advancement of Science, Publication No. 80 (Washington: 1965), p. 952.

AIR POLLUTION IMPACT OF TRANSPORTATION*

Stationary—Mobile Source Emissions Split

		CO		HC		NO_x	
		[1]Mobile	Stationary	Mobile	Stationary	Mobile	Stationary
National Totals (10^6) Tons/Year)	1969[2]	111.5	39.9	19.8	16.9	11.2	12.6
National Percent		66	34	54	46	47	53
Region	Study Year	PERCENT					
San Francisco[3]		94	6	83	17	76	24
Denver[3]		99	1	88	12	71	29
Los Angeles[3]		99	1	90	10	88	22
New York[3]		98	2	67	33	33	67
Washington, D.C.[3]		98.5	1.5	83	17	31	69
Dallas-Ft. Worth[4]	1967	95	5	99.4	0.6	68	32
Phoenix-Tucson[4]	1967	97	3	92	8	88	12
Charlotte[4]	1969	94	6	73	27	23	77
Greater Hartford[4]	1967	94	6	86	14	36	64
Providence[4]	1969	95	5	95	5	34	66
Atlanta[4]	1968	93	7	86	14	39	61

[1]Mobile sources include gasoline motor vehicles, diesel motor vehicles, aircraft, railroads, off-highways use of motor fuel, and vehicle fuel evaporation.

[2]*Summary of Nationwide Emission Estimates of Air Pollutants*, 1969, Division of Applied Technology (DAT), Office of Air Programs (OAP), EPA Revised, May, 1971.

[3]Source: State Implementation Plans, submitted to OAP, EPA, January, 1972.

[4]Source: Emission Inventory Studies, National Source Inventory Section, OAP, EPA.

*"The Implications for Transportation of New Federal Air Pollution Controls" Ronald A. Venezia, Chief, Land Use Planning Branch, Environmental Protection Agency, Office of Air Programs, Research Triangle Park, N.C.

"poisoned" by lead in the exhaust gas). The government has also proposed limits for the amount of lead that can be added to fuels, beginning in 1975. However, as long as leaded fuels are on the market, the hazard from increased lead concentration in the air and in our bodies will remain. Transportation controls to limit automobile use may be the only means left for reducing air borne lead emissions during the next two or three years before federal regulation takes effect as well as in future years when older model cars on the road will still be operating on leaded fuel.

Other auto pollutants whose effects have not yet been assessed include finely divided particles of rubber and asbestos. The rubber results from tire wear, while the asbestos particles come from brake linings. Both of these pollutants are a hazard to health if present in sufficient quantities.

The available facts and figures make it clear that the present level of automobile use in urban America is a hazard to health and has exceeded the point of economic advantage or personal convenience. The automobile is simply one means of transportation—a mode offering flexibility and convenience for the *non-routine* trip: emergency service; escape to places away from the crowds. But for our cities the auto does not provide the best of service. Rather, it traps auto-users and non-users alike in a web of congestion, noise, accidents, choking air, and concrete.

In your testimony and presentations, you should stress that, because of the many adverse effects of urban auto use, transportation control measures such as transit improvements and vehicle restraints, which result in *fewer* cars in the cities, will confer greater overall benefits than the technological emission control measures which simply will result in somewhat *cleaner* cars.

VI. REQUIREMENTS AND STRUCTURE OF TRANSPORTATION CONTROL PLANS.

This section will discuss the general form and contents required by federal law for transportation control portions of plans. The basic documents setting forth these requirements are EPA's "Requirements for Preparation, Adoption, and Submittal of Implementation Plans" (hereafter referred to as the *Guidelines*) published in August, 1971 and reprinted on the *Federal Register* at 36 *Fed. Reg.* 22398 and amendments to these Guidelines relating specifically to transportation control measures (hereafter referred to as the amendments).[18]

The Guidelines call on each State to:

—determine the pollution reduction necessary for each urban region

—demonstrate the adequacy of particular strategies to attain that reduction

—achieve the standards by 1975 unless impossible

—maintain the standards after achievement

—include adequate provisions for enforcing the plan

—provide for surveillance of sources of air pollution

—possess adequate legal authority to carry out the plan

—summarize the data used to project reductions resulting from particular control strategies.

[18]These amendments were just published in the *Federal Register* in proposed form at 38 *Fed. Reg.* 1464, January 12, 1973. Ask your local air pollution control agency or your EPA Regional Office for these documents.

A. *Determining Emission Reductions Needed.*

To determine the reduction necessary for a particular region, the State agency will employ a prediction technique termed a "model." The Guidelines require the State to use either a "diffusion" or a "proportional" (roll-back) model—unless it can demonstrate to the satisfaction of EPA that some other model is preferable.

In developing the diffusion model, a network of grids is superimposed on a map of the region and individual emission point sources are plotted on the map. Meteorological conditions and topography of the region are also incorporated in the model. The model therefore reflects the movement, concentration, and dilution of pollutants as well as the total amounts present in the region's air. Developing a diffusion model requires extensive emission inventories from individual sources, including emission rates, stack heights, and plume rise. While this type of model is recognized as the most accurate indicator of actual pollution levels within a region, most agencies, unfortunately, do not have the necessary data or resources to develop such a model.

The proportional or roll-back model is a much simpler method for determining the degree of reductions needed. Basically, it involves calculating the difference between the national standard for a particular pollutant and the existing concentration of that pollutant (known as the air quality base line).

For example, if the existing concentration for carbon monoxide (CO) is 18 ppm, achievement of the CO standard of 9 ppm would require this air quality base line to be reduced by 50%. The roll-back model assures that this reduction in *ambient concentration* can be achieved by reducing present *emissions* by the same degree. Thus if present emissions of CO are 160 tons per day and the present concentration of CO is 18 ppm, the roll-back model assumes that if CO emissions are reduced by 50% to 80 tons per day then CO concentrations will be reduced to 9 ppm. The computations in the roll-back model should include a factor to account for any existing background concentration, as well as a factor reflecting projected growth resulting in increased emissions.

It must be emphasized that the roll-back model is a primitive tool for designing a control strategy. Since the model only concerns itself with total tonnage of pollutants over a large area it cannot take account of pollution concentrations resulting from unequal spatial distribution of pollutants in various zones of the area under study. This is a particularly unfortunate shortcoming in designing a strategy to control mobile sources. Changes in traffic patterns over the period of the next few years may invalidate assumptions made in the roll-back model. As is discussed below in section VI this shortcoming emphasizes the need to select strategies which can determine future traffic patterns.

It is clear that the present air quality base line is a critical piece of information in the implementation plan. This air quality level when compared to the standard determines the amount of "work" that the State will have to do in terms of reducing emissions from sources. For example, if present CO air quality is 36 ppm a 75% reduction in emissions will be needed to meet the standard of 9 ppm; whereas if present CO levels are at 18 ppm only a 50% reduction is needed. Two determinants of the air quality baseline are of interest.

First, the validity of your State's air quality base line data depends on the location of its sampling sites. Section 51.17 of the Guidelines requires that at least one site for each pollutant be located in the "area of estimated maximum pollutant concentrations." If your State's transportation control plan does not specify the location of its samplers, check the portions of its plan submitted last year. The Guidelines require that the State's monitoring system be described in detail, so if you do not find the description in last year's submission insist that it be included in the transportation control portion. Find out the location of your city's samplers before the hearings. If you discover that no samplers are located at any of your area's major intersections, object, and request that they be installed promptly, for these are places likely to be high in auto pollutants.

Second, your State may attempt to rely on previously submitted air quality data for the base line even if more recent data shows higher levels of pollution. In support of its position the

State may cite (§51.14(g) of the amendments to the Guidelines which states that "the concentrations of carbon monoxide and photochemical oxidents set forth in the State plan as approved and promulgated on May 31, 1972. . . should be used as the air quality base line." However, the selection also states that "more recent air quality data may be used where adequate and appropriate." Just what is considered to be "adequate and appropriate" is subject to question. However, there are some indications that EPA will not consider new data adequate unless it is from a monitoring station which has been in use for at least three months. This requirements has merit if the State contends that more recent data shows that present air quality is *better* than previously measured, for short term weather conditions such as a period of high winds can clear the air temporarily. However, if more recent data shows that air quality is *worse* now it should not be ignored even if measurements were limited to one or two days, for the standards for CO and photochemical oxidants are not to be exceeded more than once per year. Thus you should insist that in setting its air quality baseline your State should use the maximum values which it has measured, even if these measurements were made after its original plan was submitted.

B. *Demonstration of the Adequacy of the Strategy*

Once the necessary emission reduction is determined, the State surveys the available techniques for reducing emissions and selects a package of measures with a total emission reduction potential at least as great as the reduction needed. Just as States may be tempted to minimize the reductions they need to achieve, so may they tend to generosity in estimating the reductions they expect to achieve from the strategies they select. Your State may be tempted in the absence of hard data to assume maximum reductions from the strategies it embraces. This is contrary to the Act's requirement that the control measures adopted must be adequate to "*insure* attainment and maintenance" of the standards. If the range of potential effectiveness of a strategy is wide, the State must assume only that the minimum, and not the maximum, reductions will result. Another advisable course is to insist that your State's plan include a sufficient number of strategies so that the emission reduction predicted for the set of strategies is greater than what the rollback model indicates is needed. For example, if the model indicates that a reduction of 50 tons in daily CO emissions is necessary, the State should adopt a set of strategies capable of reducing CO emissions by 75 tons daily. This margin of safety is necessary because of uncertainties in the accuracy of the rollback model in predicting reductions needed as well as uncertainties in estimates of the effectiveness of various transportation control measures in reducing emissions.

The uncertainty regarding how well specific control measures will work also makes it necessary to avoid adopting a plan which relies exclusively on one transportation control measure. The prudent planning course is to implement several strategies of moderate intensity rather than one strategy of extreme intensity. If a State goes forward now with several strategies it will be able to react in a flexible manner to the information that will develop as to the relative efficacy of the various strategies. The State which embraces a single strategy which fails will have to start over again with a new unknown strategy; while the State with several strategies will merely put greater emphasis on the strategies which experience has proven most efficacious.

C. *Date for Achievement of Standards.*

Section 110(a) (2) (A) of the Act requires that States' plans provide for attainment of the primary air quality standards as "expeditiously as practicable" but "in no case later than three years from the date of approval" of the plans. Since State plans were generally approved in May, 1972 the attainment date required by the law is *May 1975* or earlier.

Section 110(e) of the Act permits a State to apply for an extension of the 1975 attainment date to as late as 1977. Section 110(e) allows this two-year extension to be granted by EPA only if the State adopts and submits an adequate plan and demonstrates that specific control measures in the plan cannot be complied with within the three-year period because the technology or other alternatives necessary to enable compliance are not available.

The Act requires the Administrator himself to determine such technology or other alternatives will not be available soon enough. The Administrator must also require the application of reasonable interim controls.

The exact language of §110(e) is as follows:

> "(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in sub-section (a) (2) (A) (i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—
>
> "(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and
>
> "(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.
>
> "(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—
>
> "(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and
>
> "(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

In addition, EPA's own Guidelines repeat the conditions that must be met before an extension can be granted:

> §51.30 Request for 2-year extension.
>
> (a) The Governor of a State may, at the time of submission of a plan to implement a primary standard in a Priority I region, request the Administrator to extend, for a period not exceeding 2 years, the 3-year period prescribed by the Act for attainment of the primary standard in such region.
>
> (b) Any such request regarding an interstate region shall be submitted jointly with the requests of Governors of all States in the region, or shall show that the Governor of each State in the region has been notified of such a request.
>
> (c) Any such request regarding attainment of a primary standard shall be submitted together with a plan which shall:
>
> (1) Set forth a control strategy adequate for attainment of such primary standard.
>
> (2) Show that the necessary technology or alternatives will not be available soon enough to permit full implementation of such control strategy within such 3-year period, i.e., one or more emission sources or classes of sources will be unable to comply with applicable portions of the control strategy.
>
> (3) Provide for attainment of such primary standard as expeditiously as practicable, but in no case later than 5 years after the date of the Administrator's approval of such plan.
>
> (d) Any showing pursuant to paragraph (c) of this section shall include:
>
> (1) A clear identification of stationary emission sources or classes of moving sources which will be unable to comply with the applicable portions of such control strategy within a 3-year period because the necessary technology or alternatives will not be available soon enough to permit such compliance.
>
> (2) A clear identification and justification of any assumptions made with the respect to the time at which the necessary technology or alternatives will be available.

> (3) A clear identification of any alternative means of attainment of such primary standard which were considered and rejected.
>
> (4) A showing that stationary emission sources or classes of moving sources other than those identified pursuant to subparagraph (1) of this paragraph will be required to comply, within such 3-year period, with any applicable portions of such control strategy.
>
> (5) A showing that reasonable interim control measures are provided for in such plan with respect to emissions from the sources(s) identified pursuant to subparagraph (1) of this paragraph.

On May 31, 1972 EPA granted two-year extensions from 1975 to 1977 for attainment of the carbon monoxide and photochemical oxidant standards to seventeen States. However, in granting these extensions EPA did not obey the conditions of the law or its Guidelines. Instead it granted an extension to any State which needs transportation controls to achieve the standards.[19] Most importantly, in granting these extensions EPA did not require the States to demonstrate that it is technologically impossible for them to attain the standards by 1975.

As mentioned earlier NRDC has appealed all of these extension decisions to the courts. It is not likely that the courts will rule before February 15. However, even if your State has already been granted an extension, you can urge your State to comply with the law now.

If your State argues that it cannot meet the standards by 1975 you should insist that it follow the requirements of the law to establish the need for this delay. The law requires that the State must first design a plan that includes enough control measures to meet the standards by 1975 and then must demonstrate that the plan cannot be complied with by 1975 because *the technology necessary to carry out the control measures is not available*. This is the *only* permissible basis for an extension. General arguments about legal, administrative, or political difficulties in carrying out some control measures are not legally sufficient grounds for delay. Nor are general arguments about the "technical unworkability" of some control measures sufficient. While you should present your best arguments, it is not the citizen's responsibility to prove that suggested measures are workable; it is the *State's* duty to prove that the measures citizens suggest cannot be applied early enough, *because of the lack of technology*, to meet the standards by 1975. In most instances the State will not be able to demonstrate that this is true. Thus, you should insist that as a first step in setting an attainment date that your State assemble a plan with sufficient control measures to meet the standards by 1975. Most States will not have done this.

Citizens should also insist that even if the State decides to submit a plan that aims for a date beyond 1975, that the plan must contain available interim control measures as required by §110(e) and the Guidelines. These measures should, at a minimum, include combined transit improvement and vehicle restraints programs.

Your State may argue (or silently conclude) that since EPA has already granted it an extension it does not have to demonstrate impossibility or include interim controls. Citizens would be wise to anticipate this attitude. You should demand that if you are going to be exposed to hazardous levels of pollution for two additional years because of the State's inaction that you are entitled to a detailed public explanation in the plan of the specific technological reasons why an earlier attainment date is not possible.

If the State agrees with you but argues that it cannot prepare the 1975 plan in time for submission to EPA by February 15, insist that the State begin work on it immediately and call a second public hearing as soon as the 1975 plan is completed. Remind your State

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[19] All States required to submit transportation control strategies on Feb. 15 were granted extensions, except for Alaska, District of Columbia, Illinois, Nevada, and Oregon (which did not ask for extensions). In addition the States of Alabama, Indiana, Kansas, Massachusetts (for Springfield), Missouri, and Ohio (for Toledo and Cincinnati) were granted extensions which allowed them not to submit any transportation control strategies because their plans stated that the Federal Motor Vehicle Emission Control Program alone would allow them to meet the standards by 1977.

officials that if they do not act now to reassess their ability to meet the standards by 1975 that the courts or EPA may force such a reanalysis in a few months time. In announcing the extensions on May 31, 1972 EPA stated:

> timetables for attainment of primary standards will be subject to continuing examination, and, where the Administrator finds that more expeditious attainment is practicable, States will be required to revise their timetables. (37 Fed. Reg. 10845.)

D. *Maintaining Standards After Achievement*

The Act in section 110(a) and the Guidelines in section 51.12(a) expressly require that State plans include strategies which are adequate to insure not only the attainment of standards but also the maintenance of the standards thereafter. In the case of automotive pollutants this means the States must either develop measures which will eliminate increasing auto use as an inevitable accompaniment to future growth and development, or require large enough emission reductions now to offset future auto emissions growth, or finally to control growth and development themselves.

The amendments to the Guidelines repeat the requirement that the plan must maintain the standards after they have been reached:

> States preparing transportation control plans are also urged to give special consideration to Sections 51.12(a) and 51.14(c) (1) concerning the maintenance of the national ambient air quality standards and the offsetting of emissions increases due to growth in motor vehicle traffic and other factors. Consideration should be given to the possibility that certain improvements in transportation systems (e.g., traffic flow improvements, construction of fixed-guideway mass transit facilities) may stimulate gradual increases in motor vehicle traffic and, consequently, in emissions from transportation sources. Transportation control plans should include provisions as necessary to prevent such emissions increases from leading to pollutant concentrations that exceed the national ambient air quality standards.

In addition Appendix M of the amendments requires that the total emissions for HC, CO and NO_x both with and without implementation of the proposed transportation control strategies be projected for a minimum of five years beyond the date of attainment of the standards. NRDC is of the opinion that a 15-20 year projection requirement is more in keeping with the duty of responsible planning created by the Clean Air Act. Should you fail to convince your State to think this far ahead you can point out that if it fails to project for at least five years the plan may be disapproved by EPA as inadequate to insure maintenance of the standards. By insisting that your State comply with this requirement you can increase the necessity for it to commit itself to measures designed to maintain standards. Such measures can include long-range land-use and transportation planning. At a minimum you should urge your State to commission studies now of the air pollution effects of various alternative growth patterns and transportation system scenarios for the next 20 years. A step which can be taken immediately is the adoption of a regulation requiring all new significant construction projects to demonstrate that they will not generate traffic volumes or patterns which interfere with the attainment or maintenance of the standards. This strategy is discussed at greater length in Section VII—C below.

E. *Enforcement Requirements*

The transportation control plan Guideline amendments emphasize the importance of developing adequate enforcement procedures to assure that the selected transportation control measures are complied with. They require the States to outline all enforcement procedures to be used. Section 51.14(a) (3) of the amendments requires each State plan to—

> —describe the administrative procedures and the rules and regulations necessary to implement control measures

> —specify the date for implementing each control measure
>
> —define the agency or agencies responsible for enforcing particular control strategies (i.e. state police, city police, air pollution control officials, department of motor vehicle officials, etc.)
>
> —summarize the method for monitoring compliance with the control program (spot checks for exhaust emission levels, ticketing single occupant cars traveling in carpool or bus lanes, etc.)
>
> —outline the procedure for handling violations

EPA's Mobile Source Enforcement Division has circulated an additional document to the States detailing enforcement considerations. Since the document may not be generally available we reprint it here.

Enforcement Considerations Regarding Approvable Transportation Control Strategies

Pursuant to the publication of the proposed Transportation Guidelines in 40 CFR Part 51, the Mobile Source Enforcement Division is providing the States with the following amplification upon § 51.14(a)(3)(i)-(iv). In this manner, MSED intends to furnish guidance to the States as to how § 51.14(a)(3) should be interpreted in preparing acceptable transportation plans from an enforcement standpoint.

A. **Inpsection/Maintenance**

The requirements specified in Appendix N, Item 3.C. are considered the minimum substantive issues the State must address in order to establish an enforceable inspection/maintenance system. *The transportation plan must include proposed or adopted statutes or regulations which implement each of the requirements set forth.*

If the division of responsibility for enforcement of such a State program is shared among several agencies, each agency should clearly indicate its particular role and function. This agreement will preferably be in some tangible form, e.g. Memorandum of Understanding.

B. **Regulatory Controls**

There are certain control measures (i.e., bus lanes, carpool lanes, traffic restraints, loading restrictions, etc.) which require a regulation or ordinance to insure enforceability. *The State transportation plan must include proposed or adopted regulations to effectuate these types of controls.*

The plan should also designate the agency responsible for enforcing the regulation or ordinance and indicate how said agency will perform its enforcement role. For example, if a proposed strategy is express bus lanes, the responsible agency should include an explanation of what action they will take in order to insure compliance with regulations providing for exclusive bus lanes (i.e., prevent automobiles from using the bus lanes.)

The State should furnish an estimate of the manhours necessary in order to enforce regulations pertaining to transportation control strategies. Budgetary requirements should be juxtaposed to manhours by each agency responsible for enforcement.

C. **Capital Expenditure Measures**

There are certain aspects of given control measures (i.e., expanded bus systems, traffic flow improvements, etc.) which are non-regulatory in nature. It is necessary that certain requirements be placed on these strategies to assure their enforceability. For example, the acquisition of buses for an expanded bus system does not require regulations; however, a development schedule is required in order to insure that the buses are purchased according to schedule. Such a development schedule should provide milestones for implementation which include, at a minimum, the following:

(1) A schedule for obtaining requisite funding.
(2) A schedule for acquisition of necessary right-of-ways.
(3) Dates by which contracts will be let for acquisition of equipment or any necesary construction.
(4) Anticipated completion dates of contracts.

D. **Tax Imposition Measures**

The State transportation plan must include proposed or adopted regulations necessary to effectuate any control measure utilizing tax measures.

A structure for collection of a tax should be extablished that insures equable treatment for all parties affected by the tax. Thus, a mechanism which determines violators and provides a means to penalize those who evade the tax should be included.

Enforcement procedures are, without a doubt, as vital to the success of a control plan as the strategies themselves. You should, therefore, review these as carefuly as you do each control measure proposed by the State.

F. *Source Surveillance Requirements.*

In line with the requirements for detailed descriptions of enforcement procedures discussed above, the amendments in §51.19(d) require the State to include in its transportion plan—

> Procedures for obtaining and maintaining data on actual emissions reductions acheved as a result of implementing transportation control measures. In the case of measures involving inspection, maintenance, or retrofit, these data shall include the results of an emission surveillance program designed to determine actual average per vehicle emissions reductions attributable to inspection, maintenance and/or retrofit. In the case of measures based on traffic flow changes or reductions in vehicle use, the data shall include observed changes in vehicle miles traveled (VMT) and average speeds. The data shall be maintained in such a way as to facilitate comparison of the planned and actual efficacy of the transportation control measures.

These self-explanatory requirements are very important if the promise of the plan on paper is to be transformed into reality. The plan should specify the monitoring procedures it will employ. The design of the monitoring procedures should be scrutinized to assess their adequacy. Moreover, the operation of these procedures will require continued citizen observation in the future.

G. *Legal Authority.*

The original Guidelines (Sec. 51.11) require the State to submit a detailed description of the legal authority it needs to implement transportation control strategies and to submit a description of how and when this authority will be obtained. Although many States do not presently have the authority to implement particular strategies, lack of authority will not stand as a valid cause for rejecting strategies or for narrowing options for transportion control measures. In the *Federal Register*, May 31, 1972, EPA gave each State a deadline for obtaining the necessary legal authority and for instituting its transportation control program. (See the chart on p. 50.) These deadlines are too lenient and you should press for a tighter schedule.

The Guidelines (§ 51.22) and the amendments [§ 51.14(a)(3)(ii)] require that the plans submitted on February 15, 1973 contain all rules and regulations necessary to carry out the selected transportation control measures. The rules and regulations must be included in proposed form if not already adopted.

H. *Supporting Data Required.*

To allow assessment of the efficacy of particular strategies, in adequately reducing auto emission levels, detailed summaries of air quality data as well as data and computation used

to project reductions that will be achieved by each strategy, must be included in the State plan [Sec. 51.14(c)]. The potential success of your State's program depends on the quality of data underlying its calculation of needed pollution reductions and choice of control strategies. You should review this data in detail.

Of great importance are the figures used by the State to estimate total present and future auto emissions. States rely on the following information to make these estimates: a set of vehicle emission factors consisting of specified average pollution levels in grams per mile for each of the auto model years which are or will be on the road and estimates of the proportion of total vehicle miles traveled (VMT) in the area by each model year. In their submissions to EPA last Janaury many States employed national average figures to estimate their present auto pollution totals and used Appendix I of the Guidelines (which was also based on national average values) to estimate auto emission totals in future years. Since such important factors as vehicle age mix, driving speeds, driving patterns, and growth rates vary significantly from city to city, the amendments to the Guidelines now require the States to employ emission factors and methodology specific to their regions [§51.14(f)]. Unless your State has generated specific data of its own it should use the data and methodology presented in the EPA document *An Interim Report on Motor Vehicle Emission Estimation* (Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, Oct. 1972). Your State should have been sent a copy of this report. Be sure that it has used it to recalculate the needed emissions reductions. It can made a significant difference in estimating the degree of the present problem and predicting the size of the reductions provided by the Federal Motor Vehicle Emission Control Program. (Your EPA Regional Office may be able to provide you with a copy of this report.)

The most important set of supporting data is that used by the States to predict the reductions in emissions attributable to the transportation control measures selected by the State. As discussed in Section VII below, EPA has provided the States with specific estimates of emission reductions which can be expected from inspection-maintenance programs and from use of retrofit devices. The information available on the effectiveness of other transportation control measures such as mass transit improvements and vehicle restraints is considerably less definitive. Appendix M to the amendments specifies the nature of the supporting data which each State must present in each plan to justify assumed reductions resulting from transportation control measures. The Appendix is in six sections.

1) The plan must display total emissions of HC, CO and NO_x from mobile and stationary sources that would occur with and without transportation control measures. The Appendix specifies that emissions levels must be included for each region or subregion, and for each time period that is used in the State's original model to determine air quality levels. The Appendix includes a model format which should be followed to display the data (See Table 1).

2) Where a strategy to reduce emissions relies on distinctions between trip types or vehicle types, the Appendix requires a comparison of emission levels resulting from each trip type and vehicle type. For example, in many urban areas the emissions from heavy vehicles (trucks) are a significant proportion of the total air pollution problem. So if a control strategy is devised to reduce emissions specifically from one type of motor vehicle, the plan should describe the average emissions and VMT for trucks and cars that would occur with and without the controls.

Similarly, a strategy may attempt to reduce peak hour emissions by focusing on restricting commuter (early morning) traffic, or, if thru traffic is a substantial contributor to high pollution concentrations, a particular strategy might affect that type of trip alone. In any case where the control measure applies to a particular trip-type as opposed to all vehicle trips, then an appropriate comparison of the emissions to be expected from each trip-type with and without application of the control must be included in the plan. See Table 2 for EPA's model format.

3) Where the plan includes strategies that alter traffic flow, the emissions occuring with and without imposition of the controls should be described, as well as the average speeds and vehicle miles traveled according to roadway type.

TABLE 1

Emissions*

		Mobile		Stationary	
		With Transportation Control Measures	Without Transportation Control Measures	With Transportation Control Measures	Without Transportation Control Measures
Time period 1	Sub region 1 Sub region 2 " " "				
Time period 2	Sub region 1 Sub region 2 " " "				
Other time period as needed	Sub region 1 Sub region 2 "				

*Indicate Pollutant.

TABLE 2

Sub region _____

Time period _____

Emissions* (or VMT or Speeds)+

		Vehicle Type 1		Vehicle Type 2		Continue with other Vehicle Types as appropriate
Trip Type	Roadway Type	With Transportation Control Measures	Without Transportation Control Measures	With Transportation Control Measures	Without Transportation Control Measures	
Work	Freeway Arterial Collector Local					
Shopping	Freeway Arterial Collector Local					

Continue with other trip types as appropriate.

* Indicate pollutant.

+ The table need contain only those entries appropriate to the transportation control measures included in the plan.

For instance, any measure undertaken to reduce overall emissions by relieving congestion, i.e. increasing the average speeds, (such as one-way streets, light synchronization, reversible lanes, or construction of additional lanes) must describe the changes occuring in the average speed and VMT as well as the changes in emissions broken down by roadway type for every region, subregion and time period covered by the plan. Table 2 sets forth EPA's model display of this information. This breakdown is particularly important in the case of traffic flow strategies since it facilitates evaluation of how the effects of speeding traffic flow in one area affect other roadways in the area. One-way streets, for instance, may increase average speeds on a main artery but may increase the congestion, hence emissions, on the intersecting streets.

4) The last category of control measures referred to in Appendix M is the class of strategies that depend on *voluntary* public response for their effectiveness. This includes measures such as increased charges or taxes for auto registration, increased parking fees, instituting toll roads, increasing tolls on roads and bridges, or a wide range of incentives and disincentives offered to discourage auto use or alter the travel frequency, mode, time of day, or "other characteristics of auto demand". Where this type of strategy is proposed, the plan must also include the demand elasticities "or other appropriate quantitative measures" of public response to the incentives or disincentives and discuss which elasticities were used to project the amount of emission reduction.

The last two sections of Appendix M refer to items 1 through 4 above and require that the sources of all traffic data used to evaluate the effects of the proposed transportation control measures on air quality must be described and that the assumptions, judgments and computations underlying the conclusions 1 through 4 should be summarized.

The last paragraph of Appendix M states that:

> A transportation control plan that fails to include any element of data required by this Appendix will be acceptable only if the plan presents the data and analytic procedures used to estimate the effects on air quality of the selected transportation control measures and provides adequate justification for the use of such data and procedures.

This paragraph recognizes the possibility that some of the desired data simply may not be available. The recognition should not be read as diluting the general requirements of the guidelines that the predicted emission reduction potential of each control measure must be adequately documentd. The few plans NRDC has seen to date generally ignore the documentation requirements of Appendix M. The public has a right to know the basis for the plan's conclusions and you should insist that the data be made available in the format required by Appendix M. If your State does not include this data summary in its plan before submission to EPA, you may follow up by requesting your EPA Regional Office to require the State to compile and submit this data. Full disclosure at an early stage of the plan's assumptions will enable glaring errors in data and methodology to be corrected now.

I. *Nondegradation*

One important concept not presently incorporated in the amendments is the principle of nondegradation. Nondegradation means, simply, that in areas of the country where the air is purer than the concentrations established by the national standards, no deterioration should be allowed.

Without effective legislation to prohibit degradation of the existing air quality, polluters are effectively given free rein to contaminate those regions of "pure" air. There is little defense for a national policy that would allow such deterioration since it presumes that—

> (1) the national standards are above question and accurately reflect air quality levels considered safe for the present and future;
>
> (2) clean air is a commodity, like coal or oil, which can be depleted up to the limits currently established by law.

The first assumption does not take into account the gaps in our knowledge regarding what are the minimum damaging levels of pollutants. It ignores the likelihood that future research may uncover evidence of hazardous effects from exposure to pollutants at levels lower than our present standards. Congress has acknowledged this likelihood and made provisions in the Clean Air Act for the national standards to be revised when new evidence develops.

The second assumption ignores the fact that the rights which attach to private property do not apply to the air we breathe; air resources are in the public domain. It is inconsistent with the values the Clean Air Act seeks to protect that the setting of federal standards should be construed as a license permitting the destruction of the public trust of pure air.

A fierce battle has been waged over this issue; first in Congress and later within the White House Office of Management and Budget. The controversy is now before the Supreme Court. Pending a decision on whether to hear the case, the Court has stayed a U.S. Court of Appeals ruling which ordered EPA to promulgate regulations prohibiting any further significant degradation of existing air quality. Accordingly, at this time it has not been decided whether States must follow the nondegradation principle. They undeniably have the *right* to prevent significant deterioration. The States should be urged not to wait for the Supreme Court's decision. Rather they should adopt nondegradation regulations now.

As applied to transportation control measures this would mean the avoidance of strategies which do not reduce total vehicle pollution but simply spread it over greater areas or longer periods of time.

VII. DISCUSSION OF ALTERNATIVE TRANSPORTATION CONTROL MEASURES

The discussion which follows describes a variety of available transportation control measures. They include a set of measures with *traffic reduction* potential and a set of measures with the potential for *reducing individual vehicle emissions*. Most States are placing major reliance on the reductions promised by the new car emission controls of the Federal Motor Vehicle Emission Control Program. This section indicates that this degree of reliance is unfortunate and that traffic reduction measures consisting of combined transit improvement and vehicle restraint programs should be the keystone of the transportation control strategies.

A. *Transit Improvements*

By any standard—environmental, social, or economic—improving public transportation is the most desirable solution to the problems of private auto use in the city. It is certainly the only viable solution for the long run when the sheer magnitude of person trips made will preclude "driving into town" as we do today. Planning for long range alternative transportation systems should be instituted now. Remind your local air pollution and transportation officials that such planning is an essential component of their duty to see that air quality standards are maintained in the future.

For purposes of *achieving* the standards in the next three years, there are numerous measures, easily implemented, and at relatively low costs, which can contribute to significant reductions in motor vehicle pollution. Crucial to the success of transit improvement measures in reducing air pollution (by shifting trips from autos to a public mode) are the simultaneous imposition of measures to restrict or restrain automobile use. For purposes of air pollution reduction, transit improvements and vehicle restraints must be considered in tandem.

Readily available short-term transit improvements include the following:

—improving service of existing rail systems

—increasing bus service, expanding areas reached, increasing frequency of service, providing express bus services, direct service to stadiums, coliseums, shopping mails

—reducing travel time for mass transit vehicles with exclusive bus lanes, priority traffic feeding techniques, tightly enforced bus loading zones, etc.

—reducing transit fares

—introducing jitneys and low-fare shared cabs

—providing demand-responsive systems

—car pooling.

Almost all of these measures have received limited application in cities across the country with varying degrees of success. However, these measures have not been applied concurrently with motor vehicle restraints. Accordingly, they have not enjoyed their full potential. A good-faith effort by the State to couple increased transit service with disincentives to private auto use will be considerably more successful in reducing emissions than experiments to date.

Service improvements. The expansion of transit services is probably the most effective means for increasing patronage and effecting a reduction in private automobile trips. By adding buses to those already operating, routes can be expanded, headway (time between buses) can be reduced and comfort increased. Information systems can be greatly improved. Today it is quite inconvenient for potential riders in most cities to find out how to get from point A to point B by bus. Imaginative marketing techniques should be applied to make bus riding attractive. Installation of passenger shelters at appropriate locations will increase the attractiveness of the system. However, the most important service improvement is reduction of travel time.

Travel time reductions. One of the easiest ways to reduce bus travel time is to remove the bus from the congestion caused by the auto. Reserving lanes for exclusive or preferential bus use accomplishes this. The most recent efforts have been geared to attracting the peak-hour commuter. Several cities now run express buses from the suburbs on exclusive bus lanes—significantly cutting the travel time to work. For instance, in New York City, a reversible bus-lane was opened on the last two miles of the Long Island Expressway which enabled buses to reach the tunnel into the city in 3-1/2 minutes while passenger cars averaged 18 minutes to cover the last two miles. In Washington, D.C., buses traveling on exclusive lanes on the Shirley highway reach the Washington business district 30 minutes faster than the average auto commuter. In San Francisco, a new bus line was established to carry Marin County commuters into the city center. As a result, total bus ridership across the Golden Gate Bridge increased 35% and officials determined that vehicle traffic across the bridge decreased by 6%—resulting in 1,000 fewer cars crossing during peak hours. This bus also provides faster service than an auto, since automobile traffic is slowed or stopped at the toll booths, while the buses speed past in their own lanes. Other cities with operating or planned exclusive express busways are Seattle (the "Blue Streak"), Boston (from Quincy to Boston), Los Angeles (between El Monte and L.A.), Pittsburgh, and Milwaukee.[20] The transportation control plan which will shortly be recommended by the District of Columbia Regional Air Quality Planning Committee includes a total of nine new busways to serve the region.

Busways are likely to be more effective if they are converted from existing vehicle lanes. A busway with buses moving rapidly past an adjacent line of crawling automobiles is a free advertisement for the benefits of switching from the car. In addition, such a busway is also a vehicle restraint, since it removes from general use a lane previously available to autos. Some critics of busways say that not enough buses use the lane to justify setting the lane aside for their exclusive use. However, this misses the point. A bus lane is *capable* of carrying many more passengers per hour than an automobile lane. If it is underused at present, this simply indicates that habits are slow to change. However, the exclusive busway is a tool to change those habits. When the change occurs, the roadway will have a much greater carrying capacity.

Exclusive bus lanes need not be limited to commuter arteries. Central business district lanes may also be reserved to encourage more in-town bus riding. New York City and Philadelphia are among the cities employing this technique.

[20] Institute of Public Administration, *Evaluating Transportation Controls to Reduce Motor Vehicle Emissions in Major Metropolitan Areas*, p. 5–9, n. 1 (Interim Report, March 16, 1972). (Hereafter cited as IPA Study.)

Buses can be given priority by such techniques as limiting certain highway entry and exit ramps to buses and installing sensors in the roadway which will trip traffic signals for approaching buses. The District of Columbia will shortly undertake a project of the latter type.

Another approach to moving the commuter out of the auto into the bus is the "park 'n ride" facility. The suburban commuter drives to a parking facility on the periphery of the city or the central business district and takes a bus for the last leg of the trip into town. Although this measure may provide immediate relief for heavily congested streets in the business district, it has distinct drawbacks and should be considered second choice to actually extending bus services into the suburbs. The "park 'n ride facility" or "fringe parking" still relies on private auto use; and requires that the commuter have exclusive use of an auto, since the car sits idle in the parking lot during the day. Furthermore, large-scale use of these facilites would require large parking areas—which may well increase the congestion and pollution levels on the streets approaching the parking lot during the rush hours when hundreds of automobiles converge on one spot.

Fare reductions. In the past, transportation officials have assumed that transit patronage is inelastic, i.e. that changes in fares will not reduce or increase the number of riders. However, recent experience contradicts this assumption. In Atlanta last year, a reduction in bus fares from 40¢ to 15¢ resulted in a 29% increase in ridership. There was no increase in services and no advertisement of the reduction. Patronage is expected to jump even higher next year with the addition of 135 new buses and a promotional campaign. On the opposite end of the scale, an *increase* in transit fares can cause substantial reductions in ridership—moving more citizens into their automobiles. In New York City, the latest 5¢ increase in subway and bus fares resulted in the loss of 54 million riders annually, which represents 21,000 more cars per day in the city during peak hours, and amounts to a 15% increase in carbon monoxide levels.[21]

In an effort to supplement mass transit services and minimize dependence on the private automobile, some type of low-cost door-to-door service should be implemented in auto-choked urban areas. Jitney cabs (a system of shared cabs) are an effective means to provide this convenience in the central business district. The cabs travel continuously along the main streets, picking up and unloading passengers at any point along their route. The jitney combines the convenience of the regular taxi with the advantage of low fares—and is ultimately more efficient in terms of fuel consumption and emissions due to the increased occupancy rate. In cities like Istanbul, shared taxis supply a very large percentage of the citizens' trip-demands cheaply and quickly. This service prevailed in many U.S. cities during World War II when fuel was at a premium—it would be sensible to reinstate the system now that clean air is at a premium.

To serve areas outside the city center, various demand-responsive "limousine" or minibus services could be initiated. These provide fast service and door-to-door transportation but at lower costs than taxi service. These systems, sometimes called "dial-a-ride", are set up for speedy service but can be dispatched to cover a number of customers in one area or along a route without undue delays. Two such systems are currently being funded by the U.S. Department of Transportation's Urban Mass Transportation Administration.[22]

Car pooling. Increasing the ridership per automobile can effect a major reduction in vehicles on the road. The present auto occupancy rate into Los Angeles is down to 1.1 persons per car. This obviously represents a horrendous underutilization of resources. Two things are essential to the success of a program to increase car pooling: convenience and "necessity." Present-day computer information services should be able to maximize convenience. Car pooling can be made much less rigid than in the past. For example, while a rider may have a regular riding arrangement provided by a computer information bank, if, on occasion he wishes to leave work later, he should be able to telephone the computer, inform it of his special needs, and receive a name of a driver leaving for his neighborhood at the desired time. For such a system to work, the computer bank must be large enough to supply drivers

[21] Interview with Brian Ketcham, Air Resources Board, New York City, December 6, 1972.

[22] *IPA Study*, *supra* n. 20 at p. 5–40.

to a variety of destinations at a variety of times. This can be best accomplished by combining all offices within, say, a two-three block square in a single bank.

Incentives can also assist car pooling. Employers might provide bonus fringe benefits to car poolers; for example, car poolers might be made eligible to participate in a drawing for hard-to-get tickets to popular sports events. However, for substantial increases in car pooling, disincentives or restrictions on low-occupancy driving must be created. As discussed below, these may include higher parking fees, restricted parking, or other measures.

Finally, it is important to eliminate those aspects of a city's transit system that work against its success. A viable transit system should:

—provide for free transfer between different lines, or services; a single-trip/single fare concept

—provide service at low enough cost to become an economically attractive alternative

—provide frequent service to avoid waits of more than 5 to 10 minutes

—provide supplementary systems for door-to-door service

—provide service that does *not* require an automobile trip to reach the "pick-up" point.

Depending on the particular problems and transportation patterns of your community, any number of low-cost immediately available transit services may be practicable. As the nation's cities become crippled by automobile traffic and pollution, citizens must look to sound and imaginative transit systems that maximize convenience to the passenger, reduce travel time, and are available at low cost to the public.

Your community may need financial assistance to develop these systems. The Urban Mass Transportation Administration (UMTA) has been created by Congress for this purpose. You should urge your city to be aggressive in making grant applications to UMTA, for the funds are limited.

B. *Motor Vehicle Restraints*

As emphasized in the discussion above, vehicle restraints are an essential complement to transit improvements. They are also essential in their own right. In most cities plagued by automobile pollution, measures to curb the emissions per vehicle cannot bring about the necessary reductions for meeting national air quality standards. Steps must be taken to reduce the number of autos *entering* the city each day—either through outright bans on auto travel or by imposing a series of "disincentives" to auto use. The imposition of motor vehicle restraints may require some sacrifice on the part of the public—but by combining restraints with increased transit service, the inconvenience can be minimized and the adjustment to new travel modes made easy.

The most direct restraint is to prohibit private auto travel in the city or the central business district (CBD). Although the directness of the approach may stun many motorists, banning auto traffic should not be rejected out of hand. Consider that within the CBD in most cities, the average auto trip is 1/2 to 3/4 of a mile—distances easily accommodated by foot or bicycle. Within a larger area, increased cab or bus service can replace individual auto trips; and distances from home to city can be served by bus or rail transit.

In many instances an auto ban is the most practicable, the easiest to implement, and the least disruptive of all effective control strategies. It is a low-cost solution to drastically reducing emission levels on city streets; it requires, quite simply, an increase in transit facilities and low-cost cab or minibus services to eliminate the need for private automobiles.

It must be pointed out that the potential of this measure for *region-wide* air pollution reduction is low unless the zone of the ban is quite large. However, vehicle-free zones also serve as a showcase for the autoless urban environment and thus offer benefits beyond air pollution reduction. Automobile bans on downtown streets to control air pollution offer the added advantages of increasing space for humans, lowering noise levels, and eliminating injuries and fatalities sustained in auto accidents. Citizens are reminded that urban communities were formed for people and not machines.

More and more European cities have turned to auto-free zones, and recent studies of 70 cities where automobile bans were instituted found no serious drawbacks to the program. The impact on the economic fiber of the cities was negligible. There was no evidence of losses in retail sales—and in some cases auto-free pedestrian malls may generate increased commerce and sales.[23] Among the European cities which initiated some form of auto bans, Gothenburg, Sweden reported that after only one year the circulation on streets in the CBD was cut in half; carbon monoxide levels were cut from 30 ppm to less than 5 ppm; noise levels dropped by 50%; and there was a 5% reduction in accidents.

A number of additional disincentives exist to reduce auto traffic:

(1) increasing parking fees, eliminating on-street parking, reducing off-street parking facilities, prohibiting further construction of parking facilities

(2) taxing road use

(3) imposing or increasing tolls on bridges and roadways entering the city

(4) rationing gasoline

(5) initiating emissions tax.

Increasing the cost of parking and reducing the numbers of spaces available can be an effective means of discouraging private auto use. Parking is a prime target for regulation since current practice is both uneconomical and inequitable. Consider, first, that an individual commuter makes a $3,000 to $5,000 investment in a 2,000-pound machine capable of speeds up to 100 mph that sits idle during most of the day and incurs a direct cost to the owner for renting the space.

Second, this practice incurs additional costs to the city itself—space lost to parking that would otherwise accommodate offices, apartments, or recreation areas and the concomitant loss in property tax revenues that could be collected on developed real estate. Haphazard planning practices in our cities have led to a public policy of subsidizing parking costs—a subsidy denied to the pedestrian and mass transit user and one that generates additional hazards and annoyances for this segment of the population. The subsidy arises from the numerous on- and off-street parking facilities provided by local governments at nominal fees and from lax enforcement of existing parking regulations. Although there are no firm estimates of the total dollar cost incurred by municipalities to provide parking space, we do know that in major cities over half of the automobile users park free. In New York City alone, 45% of the cars parked on the street are illegally parked, yet fewer than 1% are ever ticketed. In the meantime, cities continue to expand parking facilities and privileges. Even in Manhattan with its dire congestion problems, parking space continues to grow at a rate of 3% a year. Besides encouraging auto trips into the city, which increases the air pollution levels, low-cost on-street parking also hampers pedestrian movement, blocks vision of on-coming traffic, ties up bus loading zones, and makes street cleaning an impossibility. Another disturbing consequence of providing parking facilities in the CBD is the amount of auto pollution directly attributable to motorists' trips searching for parking space. In New York City 7% of the total daily auto traffic consists of cars searching for parking space.[24]

There are various means to regulate parking to reduce auto emissions. Several cities are considering the imposition of a parking tax levied on all public parking facilities. The tax must be at a rate high enough to discourage using an automobile in the city—particularly in the case of commuter work trips and all-day parking. Present pricing favors the commuter by charging reduced rates for weekly or monthly all-day parking privileges—while charging substantially higher rates for hour-by-hour parking. The municipality should poll the public for its response to higher parking fees to determine the level where it becomes economically impractical for the individual to drive into the city. In most cases this probably means doubling or tripling

[23] Bremen, West Germany initiated traffic bans in 1960. Since that time the city has reported that business and commerce have prospered and the city center remains the principal focus of activity and attraction. *Automotive Air Pollution and Noise: Implications for Public Policy*, Organization for Economic Cooperation and Development, Paris (October, 1972) p. V-9.

[24] *Manhattan Auto Study*, *supra* n. 3, (draft)

present rates. This measure has an added advantage of providing increased public revenues for supporting mass transit improvements.

Regulation may be more difficult in the case of private parking facilities provided by employers and private clubs. In these cases local zoning ordinances could be introduced to restrict their use and to prohibit further construction of both private and public parking garages or lots. In addition, on-street parking should be abandoned.

In some cities, households may attempt to avoid higher parking rates by one member of the household driving the other to his or her place of business and then returning home with the car. If widespread, this practice would effectively double vehicle miles traveled during commuting hours since the commuter car would be making *two* home-work round trips daily. Accordingly, cities must accompany parking restriction programs with procedures to monitor vehicle miles traveled and be prepared to take steps to eliminate this "drop-off" pattern.

Another measure for reducing automobile trips is by taxing road use and introducing or increasing tolls on bridges, and freeways entering the city. Although this concept for regulating private vehicle use has received limited study and application, it has been tossed around in planning circles for some time. When, in 1961, a federal study of transportation problems first introduced the idea of road pricing, a supporting agency refused to release the report. But by the late sixties, then Secretary of Transportation, John Volpe, acknowledged the dilemma of increasing private auto use and the need for curbs in a speech to an international conference on urban transportation.[25] Within two years, legislation was introduced into the House of Representatives to allow cities with populations over 200,000 to collect tolls and user fees on freeways. Recent cost analyses estimate that roadway maintenance and policing costs 10¢ to 20¢ more per vehicle mile than is presently collected in special taxes and registration fees.[26] Further examination indicates that imposing road taxes in this range (10¢ to 20¢ per mile) could reduce total traffic volumes as much as 20% to 30%.[27]

Increasing tolls on bridges and freeways or allowing free passage to mass transit carriers or carpools is also effective means of reducing traffic. In San Francisco, last year, exclusive lanes across the Oakland Bay Bridge were established for carpools and buses; these vehicles were also exempted from the 40¢ toll. Within a week, the number of carpools doubled from 1,000 to 2,000 cars.

The other area for regulating motor vehicle use is by regulating or taxing the actual number of miles driven per vehicle: through gasoline rationing, or an emissions tax. Gasoline rationing is not a new concept and could be implemented through a system of coupons, similar to the program developed during World War II. It is an approach with some merit, considering that gasoline consumption has been increasing four to five per cent each year. If consumption continues at those levels, the reductions in emissions gained through improved control devices will be significantly offset in the next 15 or 20 years. Furthermore, regulation of gasoline consumption may be justified on grounds of the "energy crisis" facing the United States. National policy makers are already grappling with the problems of limited petroleum resources in the country and the economic and trade problems arising from our shortages.

Under an emissions tax system, motor vehicles would be subject to periodic odometer readings, and a tax levied on the basis of the average emissions of HC and NO_x per mile for that model year. For example, a tax is established at 15¢ per gram of pollutant; the average emissions rate for a 1972 model auto is 4.5 grams of HC and NO_x; if the car accumulated 15,000 miles during the year, the annual tax would be $101.25. The emissions tax offers the advantage of tying the costs of auto-use more closely to the real costs in terms of the environment. Some means of relating the tax to miles traveled in highly polluted areas would be valuable.

[25] See n. 33 *infra* and accompanying text.

[26] *Manhattan Auto Study*, *supra* n. 3 at p. 3.

[27] *HPA Study*, *supra* n. 20 at p. F-3.

Both approaches are direct and effective in terms of limiting automobile use—but they may be the least popular approaches in the eyes of the public. Nonetheless, they constitute viable programs for reducing emissions—in many ways allowing more freedom to the motorist than other forms of vehicle restraints. And the apparatus for implementing and enforcing the programs is not as extensive as one might think. For instance, if a State is considering an inspection program, then provisions for odometer reading and collecting emissions taxes could be incorporated in the plan—using the same personnel and the same facilities.

A final type of motor vehicle restraint is the regulation of goods movement, i.e. trucks. In some of our major cities, trucks passing through or making deliveries are a major contributor to the existing pollution levels. In downtown Manhattan, perhaps the worst case, approximately 60% of the total CO, NO_x, and HC emissions are attributable to heavy-duty vehicles, most of which are delivery trucks.[28]

There are a number of ways to tackle the problem. First, measures should be taken to route through truck-traffic around the city center. Secondly, truck delivery hours should be regulated. Presently, truck deliveries occur during normal business hours—contributing not only their heavy emissions to the overall pollution levels, but seriously tying up traffic, in many cases actually blocking streets, generating increased emissions from all types of motor vehicles. The alternative is to require deliveries during evening or early morning hours. In Germany, where 28 cities have imposed some type of motor vehicle restraints, most of these cities also imposed a ban on commercial deliveries during the hours of 10 a.m. to 8 p.m. The third means to reduce truck emissions is by insuring that each truck is filled to capacity. Studies in New York City have found that on the average, city trucks are operating at less than 10% of their capacity.[29] Cities where the truck population is a significant proportion of the total traffic could consider terminals located outside the city where goods are transferred perhaps to smaller less polluting fleets—but, in any case, to delivery fleets filled to capacity.

It should be emphasized that the need for vehicle restraints is not an unforeseen consequence of the Clean Air Amendments of 1970. In passing this legislation, Congress clearly established its intention that reforms in our urban transportation patterns would have to be effected. In repeated public statements, the legislators expressed their judgment that a change in our present reliance on the automobile would be necessary to solve the problem of air pollution as well as to resolve other hazards of increasing auto use. The Report of the Senate Committee on Public Works on the Clean Air Amendments of 1970 indicates that Congress understood the measures that would have to be taken in major cities and approved these measures for the sake of public health:

> Transportation policies must be developed or improved to assure that the impact of pollution from existing moving sources is reduced to the minimum compatible with the needs of each region. Construction of urban highways and freeways may be required to take second place to rapid and mass transit and other public transportation systems. Central city use of motor vehicles may have to be restricted.[30]

The legislators also were adamant that national air quality standards be met within three years—by applying transportation restrictions if the control technoloty were not available or sufficient:

> The bill recognizes that a generation—or ten years' production—of motor vehicles will be required to meet the proposed standards. During that time *as much as 75% of the traffic may have to be restricted in certain large metropolitan areas* if health standards are to be achieved within the time required by this bill. . .[31]

[28] *New York City Implementation Plan*, Table 3-4 (January, 1972).

[29] *Id.*, p. 7.

[30] Report No. 91-1196, 91st Congress, 2d Sess., *Report of the Comm. on Public Works*, Sept. 17, 1970, p. 2.

[31] *Id.*, p. 2 (emphasis added).

The Committee further clarified its position in a statement that public policy would have to bend to the existing air pollution crisis—by developing transportation systems to reduce emissions where gadgetry fails:

> The Committee recognizes that during the next several years, the attainment of required ambient air quality in many of the metropolitan regions of this country will be impossible if the control of pollution from moving sources depends solely on emission controls. The Committee does not intend that these areas be exempt from meeting the standards. Some regions may have to establish new transportation control regulations and restrictions in order to achieve ambient air quality standards for pollution agents associated with moving sources.
>
> The Committee realizes that changes or restrictions in transportation systems may impose severe hardship on municipalities and States, and it urges that agencies of the Federal Government make available any relevant program assistance to the States and regions to meet these obligations. The highway program, various housing and urban development programs and other sources of assistance should be examined in this connection.[32]

Although opponents of a change in present transportation patterns have criticized Congress' legislation in this area and labeled it unreasonable, these critics cannot so easily dismiss the statements of the former Secretary of Transportation, John Volpe. Sec. Volpe spoke to the issue of private automobile use in his first major policy statement in 1969:

> America must now accept the fact that the private automobile will not forever be the absolute monarch of our core cities. How and when this change will come about, we cannot yet say. But the means are not altogether obscure. We could make mass transit so attractive that habitual drivers would leave the highways. Some are convinced that dial-a-bus and other personalized modes will provide a breakthrough. We could tax cars entering the city in order to pay for police services, traffic control, parking, road repairs, and so on.
>
> More and more, the hallowed right to jump into our cars and drive them anywhere we please is being tallied against other community and individual values—the need for elbow room, clean air, stable neighborhoods, more parkland, and many others. So far, we have sought sheer mobility above every other consideration; other needs have been neglected, and the social equation is clearly out of balance.[33]

More recently, the Environmental Protection Agency Administrator, William Ruckelshaus, tossed out his ideas for reducing private automobile use at a meeting of a major automobile lobbying group, the American Automobile Association. He contended that any organization that promotes automobile travel and its conveniences must also address itself to resolving the environmental hazards the automobile creates. He remarked that if we want to preserve the automobile as an intimate part of national life then we must develop more comprehensive transportation systems, which would reduce our reliance on the auto for work and business and enhance its potential for recreation and leisure purposes. In his words:

> . . . The public must gird itself for the possibility of substantial changes in communication habits . . . . It is the very popularity of the automobile that now seriously threatens its usefulness. In many of our cities, we are confronted by pollution, congestion, noise, delay, ugliness, and urban breakdown on a scale that has not been seen since the last days of imperial Rome. . . .

[32] *Id*., p. 13.

[33] Proceedings, Fourth International Conference on Urban Transportation, Pittsburgh, Pennsylvania (March 10, 11, 12, 1969) cosponsored by the Pittsburgh Urban Transit Council and the U.S. Department of Transportation. Keynote Address by the Honorable John A. Volpe, Secretary, U.S. Department of Transportation, p. 8.

> It seems clear that we will have to be more imaginative in our design and use of the automobile if we are to insure the amenities of civilized living and keep that instant mobility we all want.[34]

C. *Complex Sources Regulation*

Another control measure which complements transit improvements and vehicle restraints is the regulation of "complex sources." Complex sources are facilities such as shopping centers, stadiums, arenas, housing projects, highways, or other facilities which attract large numbers of motor vehicles, resulting in increased levels of air pollution. Despite the obscure terminology, a complex source is hardly an obscure phenomenon. The prosperity of the last decade brought with it rapid construction of mammoth shopping malls, coliseums and sports arenas, high-rise apartments, etc., each largely unserved by public transport and surrounded by acres of parking space. In downtown areas, large parking garages are continually opening. Indeed, recent policy in some cities has been to require a minimum number of off-street parking spaces to be provided by each new office building.

The trend from now on will be to view such facilities as a "source" of pollution in view of their traffic generating potential. Construction of these facilities must be regulated if future traffic growth is to be controlled. The most effective complex source regulation is one which requires a builder to apply for a permit before constructing a new facility. To receive a permit, the builder must show that pollution, *including pollution from attracted traffic*, from his facility will not interfere with the attainment and maintenance of air quality standards (or will not significantly degrade existing air quality).

The long-term effect of this regulation on metropolitan area planning can be very great. If properly enforced, it can mean that developers will have to ensure that a truly balanced transportation system is provided for access to all major new buildings. The reliance of the past and present on thousands of automobiles to get people to their destination no longer will be permitted. As a result, this type of regulation will itself be a major source of pressure for the development of long-range alternative transportation systems.

Moreover, if the non-degradation policy is applied to complex sources, it can mean a new economic vitality for the center city. Presently, those suburbs which still have clean air can offer developers something the center city lacks: large areas for free parking. If the suburbs are no longer permitted to ignore the effects of this development on their air quality, then the center city will be returned to a more even footing and the developer will be denied a haven for irresponsible development.

Your State may contend that a complex source regulation is not necessary in the plan now, arguing that it will not reduce emissions by 1975 or 1977. In response: first, insofar as the regulation prevents traffic growth and congestion which otherwise would occur over the next three to five years, it does effectively reduce emissions. Second, the city cannot effectively implement other transportation control measures designed to affect vehicle miles traveled and traffic patterns unless it has authority to regulate new building which will influence these factors. Third, the State has a legal duty to include measures in its plan *now*, necessary to insure that air quality standards are maintained in the future. The complex source regulation is a maintenance measure that can be implemented now without further study.

D. *Federal Motor Vehicle Emission Control Program*

Under §202 of the Clean Air Act, EPA sets emission standards for all new motor vehicles sold in the U.S. On paper, this new car emission control program results in impressive reductions in pollutants, particularly after 1975, when cars equipped with emission controls reducing hydrocarbons (HC) and carbon monoxide (CO) emissions by 90% from 1970 model year levels are scheduled to be on the road. [Similarly reduced nitrogen oxide (NO_x) emissions are scheduled for 1976 model year cars.] As a result, State air pollution planners are assuming substantial reductions in these pollution levels due to this program.

[34] Speech to the American Automobile Association, Detroit, Michigan, September 13, 1972.

"At this writing, however, it is by no means clear that appropriate exhaust control systems will be available to meet the deadline imposed by Congress. Furthermore, even if exhaust control systems are developed by the deadline to meet new car emission standards, these systems may be highly unreliable. These inherent uncertainties as to the availability and reliability of new systems argue strongly for *contingency planning*, an argument that is reinforced by other considerations. For example, it may well be that the increased cost of a vehicle arising from pollution control and safety equipment will discourage the replacement of old vehicles. Also, it should be realized that as Americans depend increasingly upon the automobile as a way of life, more and more vehicles are going to be in circulation."

Institute of Public Administration, *Evaluating Transportation Controls to Reduce Motor Vehicle Emissions in Major Metropolitan Areas* at p. 6 (Interim Report, March 16, 1972). (Final Report, Nov. 20, 1972 available from EPA, Air Pollution Technical Information Center, Res. Triangle Park, N.C.)

This dependence on the federal program, if it persists, undoubtedly will be one of t major failings of the State Implementation Plans. The difficulty with this reliance rests in t States' assumptions. They assume that the federal new car standards will be met on schedu by the 1975 and 1976 model year autos. They assume that deterioration of the advanc emission control systems will not be excessive. They assume that the procedures used certify new cars as complying with the standards are accurate indicators of on-the-road pe formance. They assume that the roll-back model used to calculate needed reductions in em sions is sufficiently accurate so that selection of contingency control measures is not nec sary. Each of these assumptions is very tenuous.

While EPA has determined that the technology exists to meet the 1975 HC and C emission standards on schedule, there is no assurance that this will occur. The auto indust continues to fight a war of attrition against this goal. They have appealed to the courts for year's delay in the standards. They can apply again to EPA for a similar delay. They are like to apply to EPA for a year's delay in meeting the 1976 NO_x standard as well. If either these delays is granted, the reductions promised by the federal program will be significant diminished.

Even if these cars meet the deadlines, few experts have any faith that they will contin as low emitters for the periods officially projected. Deterioration in performance over time expected to be a major problem for the catalytic emission control devices on 1975-76 vehicle These catalysts may be subject to breakup or deactivation, in which case the emissions c increase by as much as a factor of 9. EPA's deterioration factors assume only a three-fo emission increase after the car is five years old.[35]

This deterioration assumption is made in the face of EPA's recent proposals that catalys may need to be replaced entirely after the equivalent of only two and one-half years of us These proposals permit manufacturers to perform major maintenance on or even replace t emission control devices on the cars they use to pass EPA certification tests.[36] There is r assurance that owners of these vehicles will perform this maintenance as conscientiously Detroit's engineers. If they don't, then the cars' emissions will increase. When this occurs, t total emissions reductions predicted for the federal program will not be achieved.

Recently EPA has accused major automakers of installing devices to "defeat" their emi sion control systems under a variety of conditions. If EPA is correct in its assertions that the devices have the effect of increasing emissions, then there are millions of cars now on the roa

[35]EPA, *An Interim Report on Motor Vehicle Emission Estimation*, Table 9 (October, 1972).

[36]37 *Fed. Reg.* 23778 (November 8, 1972).

In illustrating the need for transportation control measures other than exhaust controls in implementation plans, Dr. Ronald A. Venezia, Chief of EPA's Land Use Planning Branch, surveyed the pitfalls in predicting reductions from the federal emission control program:

> Taken singly or in combination, the possible errors can be described as follows: The Federal exhaust test procedure has been modified several times to measure auto emissions more accurately. The driving cycle that is based on an average route speed has been adjusted to simulate the average urban driving pattern more closely. But experts recognize that "conditions to which an emission-control system would be exposed by the driving public are more variable and extreme than those to which it would be exposed during the emission test." Therefore, exhaust device deterioration and emissions are likely to be greater than presently calculated. How much greater can only be determined after 1975 and then only if the "spatial and temporal distribution of actual route speeds and idling times" is known.
>
> There are uncertainties about the exhaust control device relating to its deterioration rate, additional research into catalysts and manufacturing lead times, in addition to the administrative problems of mandatory inspection.
>
> Projected urban VMT can vary from city to city. It was assumed that VMT/vehicle would remain constant at an average of 9800 miles/year/vehicle. The average annual mileages of various model year cars according to Bostich and Greenbalgh varies from 13,200 miles for cars less than 1 year old to 5,700 miles for cars 10 to 11 years old.
>
> In areas of increasing urban sprawl and of populaces with increasing leisure time, it has been noted that persons make more and longer trips. Apparently, the improved highway systems required to service urban areas stimulate a latent trip demand. Because traveling is easier and quicker, people travel longer distances more frequently. VMT/year may also increase at a rate greater than presently calculated if total area vehicle populations grow more rapidly than expected.

Venezia, R.A. "The Implications for Transportation of New Federal Air Pollution Controls," at pp. 18-19 (notes omitted).

which are emitting higher levels of pollutants than they are supposed to under the federal program. Again this causes a shortfall in the achieved total emissions reductions—no one knows by how much to date.

For all these reasons, it would be prudent for States to use more conservative estimates of the emission reductions attributable to the federal emissions control program than the predictions provided by EPA. However, most States are taking every bit of credit possible for federal program reductions. You should remind your State that it is its duty under the law to *insure* that the standards are achieved and that this can best be accomplished by planning for the contingency that the federal program will fall short of its goals. (See boxes on pages 30 and 31.)

Finally, as discussed in Section VI.A., the primitive nature of the roll-back technique for predicting the reductions that cities will need to achieve clean air suggests that it would be prudent to place a good deal of emphasis on control strategies which have a direct effect on factors which determine volume, concentrations, and location of auto pollutants. Such factors include the total vehicle miles traveled (VMT) in an area; the distribution of VMT over the region (i.e., congested zones); the distribution of VMT over time (i.e., peak hour traffic); and

the route speeds and idling times at various locations and times.[37] The exhaust controls of the federal program have no effect on these factors. However, transit improvements, vehicle restraints and complex source regulation can determine these factors. Accordingly, their presence in your State's plan to offset the failings of exhaust controls and the roll-back model is strongly recommended.

E. *Mandatory Maintenance and Inspection Programs*

An inspection-maintenance program is designed to identify those vehicles on the road with excessive emissions[38] resulting from malfunctioning engine components and to correct this malfunctioning. The procedure involves measuring the amounts of carbon monoxide, nitrogen oxides, and unburned hydrocarbons emitted from the exhaust systems. On the average, light-duty vehicles (1971 models and earlier) with proper maintenance emit approximately five to six grams per mile of hydrocarbons, 70 grams of carbon monoxide, and 2½ to 4 grams per mile of nitrogen oxides. If a vehicle is found to emit excessive amounts of these pollutants, a variety of adjustments may be made to reduce exhaust emission levels:

1) routine adjustment of idle speed, air-fuel ratio, and spark advance to the manufacturer's specifications
2) replacement of minor parts such as air filters, PCV valves, heat risers, vacuum lines, gaskets, etc.
3) repair, rebuilding, or replacement of the carburetor
4) replacement of plugs, points, condenser, distributor
5) major mechanical work involving repair or replacement of rings or valves.

EPA commissioned several studies to consider the feasibility and effectiveness of inspection-maintenance programs and subsequently established the minimum requirements for an acceptable program (contained in Appendix N of the transportation control amendments to the Guidelines). Also included in Appendix N are the projections of maximum reductions per vehicle to be expected from inspection-maintenance programs:

HC	12%
CO	10%
NO_x	0

Unfortunately there has not been ample opportunity to validate these reduction projections, particularly in respect to deterioration of the engines after maintenance. EPA adjusted the actual reductions achieved in testing by a "best guess" factor to account for deterioration. In other words, the actual tests projected reductions of: HC 24%, CO 18%, and NO_x 0. Assuming annual inspections, EPA estimated a return to the original emission rates during the 12-month period, which effectively cuts the reductions (on a yearly basis) in half.[39]

Numerous other factors may influence the effectiveness of an inspection-maintenance program. These include:

1) type of vehicle exhaust test used (loaded dynamometer or idle mode testing)
2) vehicle age mix in the region
3) skill of personnel in performing tests and maintenance
4) per cent of motor vehicles actually inspected and brought into compliance

[37] See Venezia, R.A., "The Implications for Transportation of New Federal Air Pollution Controls," at p. 16.

[38] The amounts of each pollutant in the exhaust vary with engine weight, size, and type of transmission. *Excessive emissions* are levels above the limits established by the State for various models and model years.

[39] This assumes that the deterioration occurs at a regular rate, i.e., 2% per month in the case of hydrocarbons, 1.5% a month in the case of CO. The yearly emission reduction will be lower than estimated if deterioration occurs faster in the first three to six months of operation than in the second half of the year.

5) incidence of owners operating and maintaining car properly between inspections.

1. Type of vehicle exhaust test used.

Besides the variations in exhaust emissions resulting from one model year and engine type to another, emission rates are highly dependent on the travel speed and driving conditions, i.e., stop-and-go driving, uphill or downhill traveling, operating from a hot-start or a cold engine.[40] Originally experts looked to the simplest and lowest-cost testing procedure—sampling the exhaust while the auto is in idle. However, subsequent study concluded that the variations in the exhaust emissions when the engine is under stress were significant enough to develop procedures for sampling exhaust emissions under simulated driving conditions. This is called "loaded emissions testing" and requires a dynamometer, which applies the same stress on the engine that would occur in each phase of vehicle operation (starting, accelerating, decelerating, climbing grades, stop and go, etc.).[41]

Other types of testing are not as effective in identifying cars with excessive emissions. The idle test only measures exhaust emissions when the car is operating in idle mode, so the test results do not indicate excessive emissions occurring in the other driving modes. Therefore, the maintenance necessary to pass an idle test may not be adequate to effectively reduce exhaust emissions occurring under normal driving conditions.

EPA also considered vehicle emission control programs which do not involve sampling the exhaust from each automobile—either by checking and adjusting the engine components which influence exhaust emissions (Engine Parameter Inspection) or by requiring car owners to have their cars tuned up every year (Mandatory Tune-up). However, test results showed that the most reliable means for identifying cars with excessi. emissions and correcting the problems is to *sample the exhaust emissions using a dynamometer to simulate driving conditions, and then make the adjustments or repairs indicated by the exhaust sample.*

Therefore, Appendix N (paragraph 6.a) requires that any vehicle inspection other than those using the loaded emissions test will be acceptable only if the State submits sufficient data to justify the reductions it claims.

2. Vehicle age mix.

The vehicle age mix of a region may cause emissions reductions to vary from reduction levels projected by EPA. Cars manufactured before the 1968 model year (1966 in California) have substantially higher emission rates than later models which are equipped with control devices. Although preliminary testing (of sample fleets up to 1971 model year) found that the per cent reduction per vehicle from inspection-maintenance did not vary significantly for pre-controlled autos as opposed to later model cars, this finding cannot be validated until an inspection program is tested on a large scale. Furthermore, achieving the reductions on older cars will in many cases require extensive repairs that entail high costs; the projected reductions do not reflect emission rates for these vehicles.[42]

But a more important consideration than the differing results which might occur between pre-'68 and later models, is the drastic change in effectiveness of an inspection-maintenance program which will occur once 1975 models are on the road. By 1975 new automobiles sold in the U.S. must be equipped with extensive control devices that reduce emissions of HC and CO to 10% of present levels, and by 1976, NO_x emissions must be reduced an equal amount. This means in three to five years, the overall emission reductions to be achieved by inspection-

[40] Cold starts, uphill driving, and stop-and-go driving all result in increased amounts of CO and unburned HC in the exhaust.

[41] There are a variety of "loaded test" procedures for sampling the exhaust in different driving modes. These are described in the EPA document *Control Strategies for In-Use Vehicles*, Office of Air and Water Programs, Mobile Source Pollution Control Program, Washington, D.C. 20460 (November, 1972).

[42] Automobiles requiring over $100 in repairs were dropped from further testing.

maintenance may be considerably lower. In fact, the "experts" do not know at this time if existing inspection-maintenance procedures will even be applicable to the 1975 and 1976 model cars.

Appendix N addresses this problem but unfortunately indicates that the reductions achieved in testing of pre-1971 model cars may be considered applicable to future models:

> The effectiveness of inspection/maintenance programs in reducing emissions from future model year vehicles will depend primarily on the extent to which *emissions from those vehicles increase in use as a result of repairable malfunctions and on the ability of the inspection test to accurately identify vehicles having such malfunctions. These factors can be evaluated only after substantial numbers of such vehicles have been in use for some time.* However, for implementation planning purposes, it has been assumed that emissions reductions estimated to be achievable for current light duty vehicles will be applicable for future model years as well. (paragraph 6.a) [emphasis added].

You should point out to State planners that because no information is available on which to base this assumption, they should not include any reductions resulting from application of the program to post-1974 model year autos in their estimates of future reductions from the inspection-maintenance program.

3. Performance of tests and maintenance.

According to study results, the effectiveness of any inspection-maintenance program is highly dependent on the skill of the personnel performing the test and their conscientiousness in adequately servicing vehicles. There are three areas in which performance of the inspection-maintenance crews might break down:

—vehicle testing and analysis of exhaust sample

—diagnosis of repairs and adjustments needed

—actual repair and adjustment work.

Because EPA conducted its exhaust sampling tests in special labs, there is no indication of the range of error to be expected in testing vehicles. The accuracy of testing procedures will depend in large measure on the quality of training provided the personnel and on a more elusive factor—their conscientious performance. This requires reasonable pay scales, adequate numbers of personnel, and strong public support for "tight" inspection enforcement.

The second area of performance, diagnosis of repairs and adjustments needed, presents more complicated problems. EPA studies found that even where complete diagnostic information was provided to the repair agencies:

> ...They evidently did not fully utilize the diagnostic content of the inspection test results, but appear to have resorted to normal tune-up procedures.[43]

This tendency for repair garages to misinterpret or disregard diagnostic information provided by the inspection test leads to inadequate servicing or to over-servicing which substantially increases vehicle costs either to the State or to individuals. For instance, EPA found that garages were performing major ignition tune-ups on twice as many automobiles as was called for by the exhaust tests results.

Furthermore, ten to fifteen per cent of the cars tested *and* serviced failed a second inspection test. At least one-third of these failures were due to unsatisfactory repair. The balance required "excessive" repairs (over $100) in order to meet inspection criteria. Considering the notoriety that the auto repair industry has received in this country for inadequate performance at skyrocketing prices, these sample results may be merely the tip of an iceberg. Certainly any program applied on a large scale imposing less supervision and greater demands than these isolated tests will probably result in substantially lower performance rates.

Paragraph 3.c (iii) in Appendix N requires the State to include in an inspection-maintenance program:

[43] *Control Strategies for In-Use Vehicles*, *supra* n. 41 at p. 2-27 (draft).

> Provisions to ensure that failed vehicles receive the maintenance necessary to achieve compliance with the inspection standards. This might include sanctions against individual owners or repair facilities, retest of failed vehicles following maintenance, a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts and knowledge to perform the tasks satisfactorily, and/or other measures.

While the requirement is clear and comprehensive, the types of provisions necessary to meet the requirement may be difficult to institute and enforce. There is presently no adequate system "*to ensure*" that repair facilities have the necessary "*knowledge* to perform the tasks satisfactorily." Unfortunately, existing training programs in emissions control device repair and maintenance are minimal; large-scale programs must be *designed* to instruct and examine personnel involved in testing and maintenance. One study estimates that 174 hours of training would be required to train personnel in diagnostic testing[44]—the type of testing found most effective for identifying *and* adequately repairing "high emitters." It will be difficult to eliminate collusion between inspection personnel and automobile owners—since many auto owners will see substantial gains from "buying" a passing grade on inspection tests rather than paying for the repairs necessary to bring their cars into compliance.

You should insist that:

—the State run its own testing facilities rather than license private garages;

—that an adequately staffed inspection team is provided to certify and inspect repair facilities;

—that a retest in a State facility is required for failed vehicles that receive maintenance;

—that adequate training programs are provided and successful completion required for all personnel performing tests and maintenance;

—that spot-tests for excessive exhaust emitters are regularly conducted;

—that fines for offenders (repair facilities as well as individual auto users) are set high enough to deter collusion and/or encourage conscientious performance by maintenance personnel;

—finally, that adequate funds are budgeted to cover each of these aspects of the program.

4. Number of vehicles inspected.

A fourth factor influencing the effectiveness of an inspection-maintenance program is the actual proportion of the total population that undergoes inspection and is brought into compliance with allowable emission levels. From tests conducted in Michigan and California, the EPA study concluded that at least 50% of the total vehicle population should be inspected if projected reductions are to be achieved. Obviously, the larger the proportion of motor vehicles inspected and serviced, the more successful the program will be in reducing emissions; your State should provide adequate facilities and staff for testing and enforcement to bring more than one-half the total vehicle population into compliance.

Appendix N (paragraph 3.a) stipulates that in a State plan, "emissions reductions [from annual inspection-maintenance] may be assumed only to the extent consistent with the portion of the vehicle population that has been inspected by that time." In other words, the projected reductions apply per vehicle. Be sure the State has computed reductions only on the basis of the number of vehicles it can reasonably hope to inspect and bring into compliance. In all likelihood, the actual number will be lower than projected.

State-run facilities, such as inspection lanes operated off main arterials, are presumably the best approach for reaching the greatest numbers of cars. These facilities are not only more convenient for the motorist but also service a greater number of cars than individual garages. In safety-inspection programs conducted across the country, private garages handle an average

[44] *IPA Study*, p. 1-13.

of 800 cars per year, while State-operated facilities test approximately 50,000 vehicles per year. With such a large capacity, State facilities can mean lower program costs and increased potential for servicing larger segments of the vehicle population.

The number of facilities, their location, and the staff size—all influence the percentage of automobiles that will actually be brought into compliance. Any State plan that includes inspection-maintenance programs should give careful consideration to these problems. Considering that approximately 40% of the automobiles on the road are "excessive emitters," it becomes crucial to reach as many vehicles as possible.

5. Maintenance between inspections.

A final consideration that may reduce the effectiveness of an inspection program is the failure of owners and users to properly maintain their cars between inspections. Exhaust emission tests made in New York City on late-model cars indicated that voluntary maintenance was minimal—and the average car and even taxi cab (maintained in a fleet) did not meet manufacturer's specifications for emission levels in the exhaust. Furthermore, owners often undo adjustments that reduce emissions because they interfere with individual driving and operating habits. For example, readjusting the idle to higher speeds allows for faster starts; changing the air-fuel ratio to "rich" levels provides more fuel and facilitates cold-starts. But both adjustments result in higher emissions. Appendix N of the amendments specifically requires an inspection-maintenance program to include a "program of enforcement" to prevent these intentional readjustments. [§3.c (iv)]. A system of spot-checks of exhaust emissions and physical tagging of adjusted engine components should be incorporated in any State inspection program for it to be acceptable.

Although EPA test results from inspection-maintenance programs apply to light-duty vehicles (automobiles) only, the same approaches can be applied to heavy-duty vehicles. However, Appendix N stipulates:

> Transportation control strategies employing inspection/maintenance or retrofit of vehicles other than light duty vehicles will be acceptable only if sufficient data and analyses are provided to justify the emissions reductions claimed.

Because the State agencies are not able to claim reductions from retrofitting trucks and other heavy vehicles, they may not want to include this strategy in the plan. If your State plan includes an inspection-maintenance program, press State officials to incorporate testing and maintenance for trucks, since this will contribute to reductions in existing pollution levels, particularly for those districts of a city where truck traffic generates the largest proportion of the exhaust emissions.

While inspection-maintenance can be an effective means of reducing exhaust emissions, the considerations discussed here will substantially affect the overall reductions achieved. State plans must provide for a margin of "failure" in computing reductions from an inspection-maintenance program and provide alternate strategies to offset reduced effectiveness of the program.

F. *Retrofitted Emission Control Devices*

Automobile manufacturers were not required to equip automobiles with emission controls until the late nineteen-sixties. While almost 85% of the cars on the road today have some form of emission control, only 40% are equipped with *exhaust* controls—and reductions from these devices are still far below levels technologically possible today. Emission control devices are available for installation on (or "retrofitting" of) uncontrolled and insufficiently controlled used vehicles.

The devices currently available for retrofit and recently tested by EPA are designed to reduce pollutants in the exhaust gas: ignition timing devices, air/fuel ratio variations, exhaust gas recirculation, and exhaust gas controls (chiefly by use of a catalytic converter).

Ignition timing devices operate on the principle of retarding ignition spark to lower the peak temperatures in the combustion chamber and increase temperatures in the exhaust. The

changes result in less NO_x formation in the engine and increased oxidation of HC in the exhaust. The most effective way is to disconnect the vacuum spark advance mechanism of the distributor (VSAD). The device includes a temperature-sensitive switch to allow the disconnect to occur automatically during different driving speeds to avoid overheating the engine.

The air-bleed to intake manifold system is a type of *air/fuel ratio modification.* The device is an air valve that meters additional air to the intake manifold to create a lean air/fuel mix. (The air/fuel ratio can also be increased by modification of the carburetor.)

With an *exhaust gas recirculation* system (EGR) 15% of the exhaust gases are recirculated by means of a vacuum-operated valve into the air induction system. This reduces the temperature in the combustion process, resulting in lower NO_x emissions. This device is controlled by a speed control valve which shuts off the system at speeds below 26 mph.

The *catalytic converter* works by further oxidizing the gases in the exhaust. The exhaust gas is passed through a small canister containing a catalyst (platinum and palladium are the most efficient) which oxidizes the HC and CO to form carbon dioxide (CO_2) and water. The heat from the exhaust itself activates the catalyst and the additional oxygen needed is supplied from leaning the fuel mixture at the carburetor or by installing an air pump.

EPA tested these devices for emission control effectiveness, cost and driveability effects and incorporated the results in Appendix N of the transportation control guidelines.[45] Although these results represent the best information available on retrofit devices, the testing was quite limited and the projected reductions indicated in Appendix N (4.a) should be approached with some caution.

In the first place, the tests were performed on a very small sample of 20 precontrolled vehicles (cars manufactured before 1968 nationwide, pre-1966 in California). The sample fleets were drawn from the vehicle population in Michigan and California; it was assumed that the fleets were representative of the national vehicle age mix (for pre-controlled vehicles). However, experts have found the model-age mix is "city-specific," varying considerably from one area to another, and that this variable "becomes increasingly important in emission factor calculation."[46]

Second, because EPA testing included only pre-controlled vehicles, reductions for late-model cars are simply estimates drawn from results of pre-controlled testing. In areas where controlled cars are a substantial proportion of the vehicle population there is greater uncertainty about the overall reductions to be achieved by a retrofit program.

Most importantly, there is great uncertainty regarding the deterioration rates for retrofit devices. The durability tests reported by EPA included only one to three tests at zero miles and one to three tests at 20,000 to 25,000 miles. Although these tests indicated severe losses in efficiency, the reductions cited in Appendix N discount any losses from deterioration:

> . . . it appears that the average annual emissions reductions per retrofitted vehicle can approach the observed mean initial reductions if suitable inspection and maintenance criteria are adopted. Accordingly, it has been assumed for planning purposes that the observed initial emissions reductions will not be affected by deterioration.

This assumption seems risky given EPA's test results:

1) Appendix N indicates expected reductions from lean idle air/fuel ratio adjustment and VSAD to be:

HC	25%
CO	9%
NO_x	23%

[45] See Table 3. Findings are summarized in *Control Strategies for In-Use Vehicles*, EPA, Office of Air and Water Programs, Mobile Source Pollution Control Program. Washington, D.C., November, 1972.

[46] Kircher & Armstrong, *An Interim Report on Motor Vehicle Emission Estimation*, Oct., 1972, p. 4, EPA Office of Air Quality Planning and Standards, Research Triangle Park, N.C.

These are very close to the initial reductions achieved. But after 25,000 miles, reductions dropped to:

HC	8%
CO	-24%[47]
NO_x	39%.

2) In tests of exhaust gas recirculation and VSAD the mean reductions achieved were used in the projection contained in Appendix N:

HC	12%
CO	31%
NO_x	48%.

Yet the durability test after 25,000 miles showed:

HC	- 3% (increase)
CO	-55% (increase)
NO_x	10%

The CO increases were once again attributed to a faulty choke mechanism. Reductions in NO_x control were assigned to failure of the speed control switch in the EGR unit which was replaced twice.[48] There was no explanation given for the large increases in hydrocarbon emissions.

3) The durability tests of the air bleed to intake manifold device uncovered similar irregularities. Mean reductions were:

HC	21%
CO	58%
NO_x	- 5% (increase).

After 25,000 miles, three tests indicated reductions of only 7% for HC and 7% for CO. Because the air bleed device is primarily for control of CO, the device was re-installed and adjusted. Only then did emissions reductions approach the mean levels (64% for CO). In effect, 64% represents an initial reduction, since it was not subjected to an additional 25,000 mileage test. Of the four types of controls EPA tested, *only* the catalytic converter achieved reductions at 25,000 miles which approached initial effectiveness.

Finally, in determining the expected reductions from each device, EPA used the mean reductions achieved in testing. Paragraph 4.b (i) of Appendix N states that these were adopted "as being the most representative of the initial emissions reductions which may be achieved in an actual retrofit program." However, the range of reductions actually achieved is quite wide (See Table 3). These extreme variations indicate that State planners should consider the mean reductions cited as the *maximum achievable* reductions. If your State's plan calls for a retrofit program, point out the test results to your State officials and press officials to assume reductions lower than those cited in Appendix N. This will provide for the likelihood of a retrofit program achieving lower reductions without jeopardizing your State's ability to meet national standards.

The information presented in Appendix N and in the EPA document on retrofit applies only to light-duty vehicles (passenger cars). Yet, trucks are substantial polluters in many cities and retrofit devices (based on the same techniques for trucks as those for cars) are available. If your State adopts a retrofit strategy, it should be applicable to trucks as well as cars. There are districts in major cities where high pollutant concentrations are almost entirely attributable to truck traffic—retrofit for automobiles alone would have little or no effect, and the public and auto owners would be penalized while the trucking industry continues to pollute.

As noted above, EPA's assumptions of the reductions achievable from retrofit strategies depend on the State's adoption of "suitable inspection and maintenance criteria." Accordingly,

[47] This increase could be attributed to faulty choke operation (not necessarily deterioration of the device itself). However, the car operated normally during the testing. In any event, the increase is an indication of what to expect in actual applications.

[48] The first time the switch was damaged in a car-wash facility; later the replacement became inoperative (cause unknown) and had to be replaced again.

TABLE 3

RANGE OF REDUCTIONS ACHIEVED WITH RETROFIT DEVICES

Device	Pollutant	Range of Reduction(%)	EPA Projected Reduction (%)[1]
Catalytic Converter with VSAD	HC	53 to 90	68
	CO	37 to 97	63
	NO_x	17 to 64	48
Lean Idle Air/Fuel Ratio with VSAD	HC	9 to 29	25
	CO	8 to 77	9
	NO_x	27 to 47	23
EGR with VSAD	HC	3 to 21	12
	CO	6 to 60	31
	NO_x	43 to 52	48
Air Bleed to Intake Manifold	HC	10 to 32	21
	CO	22 to 80	58
	NO_x	-15 to 5	- 5

Source: *Control Strategies for In-use Vehicles*, U.S. Environmental Protection Agency, Office of Air and Water Programs, Mobile Source Pollution Control Program, Washington, D.C., (November, 1972.)

[1] Same as mean reductions achieved, except for lean idle air/fuel ratio with VSAD where mean reductions were: HC—19%, CO—46%, and NO_x—37%.

the inspection and maintenance criteria may well be the most important component of any retrofit strategy your State adopts. EPA's requirements along these lines are quite thorough and should be followed to the letter by States adopting retrofit strategies. The EPA requirements read as follows:

c) Requirements

An acceptable retrofit program must include:

i) A method of ensuring that personnel installing the retrofits have the knowledge required to perform the needed tasks satisfactorily and have an adequate supply of retrofit components and that these components will be capable of achieving the claimed reductions.

ii) Provisions for emissions testing at the time of retrofit installation or some other positive assurance that the retrofit device is installed and operating correctly.

iii) Provisions for inspection of each retrofitted vehicle at least once per year.

iv) Provisions for the establishment of inspection standards for retrofitted vehicles consistent with the emissions reductions claimed. Particular attention must be paid in this regard to catalytic converter retrofits as the reductions cited in paragraph 4.a do not include possible irreversible catalyst deterioration over time.

v) Provisions to ensure that vehicles failing inspection receive the maintenance necessary to achieve compliance with the inspection standards.

vi) In the case of retrofit programs that include the use of catalytic converters requiring unleaded fuel, provisions to ensure that vehicles utilizing this type of retrofit will not use leaded gasoline and that adequate supplies of lead-free gasoline will be available if Federal regulations will not insure availability, and provided that such provisions are not in violation of Section 211 (c) (4) of the Act.

In addition, any adopted retrofit program must provide, as required by § 51.19 (d), for field verification of the emissions reductions actually achieved in the implemented program. (See discussion of § 51.19 (d) at p. 16, *supra*.)

These requirements are the heart of an acceptable retrofit strategy. Protest strongly to your EPA Regional Office is your State attempts to claim credit for retrofit program reductions without committing itself to the implementation of the inspection, maintenance, and surveillance components of the program.

G. *Traffic Flow Measures*

This strategy is based on the finding that motor vehicles operating in stop-and-go situations and low speeds emit higher quantities of pollutants in the exhaust stream. Moreover, traffic congestion tends to cause a build-up of pollutant concentrations in a small area. Measures to increase travel speeds and prevent congestion include a wide range of controls to speed the movement of automobiles and trucks: one-way streets, reversible lanes, median controls to reduce the number of turning points that stop traffic, light synchronization, bans on left turns, removing pedestrian crossings and walkways, directional lane markings, etc.

These measures have the greatest effect in cutting emissions at the "lower bounds"; for example, when speeds are increased from five to ten miles per hour. At higher speeds the reduction in emissions per vehicle is somewhat less.

There are two important points to note when considering traffic flow strategies. First, most cities already employ these techniques for the sake of convenience and to increase roadway capacities. Therefore, the opportunities for new applications may be limited. But more important, evidence has shown again and again that employing traffic flow measures reduces emissions for a very short time—then the increased speeds and easy flow actually induce *more* traffic, leading to increased emission levels. Estimates of effectiveness allow only six months to a year before the emissions increase again[48]—to even higher levels than originally present because the roadway capacity is, in fact, expanded.

[48] *IPA Study*, *supra* n.20, p. D-4 (draft).

A study of traffic patterns in Chicago before and after construction of the Congress Street Expressway in 1961 determined that the total vehicle miles traveled (VMT) in the area jumped by 21% with completion of the highway—the equivalent of a 7% per year increase, which is twice the normal VMT growth for Chicago. Similarly, in 1964 the Theodore Roosevelt Bridge was constructed crossing the Potomac River into Washington for the purpose of diverting traffic from other crossings. Within a year's time the total amount of traffic crossing at all the bridges had increased—offsetting the benefit of traffic originally diverted from more heavily congested bridges.

Studies of the impact of the beltway system circling Washington, D.C. found that this highway system contributed directly to increase commuter trips terminating in the city as well as inducing phenomenal increases in through trips along the circumferential route. Commuter traffic in 1976 is projected to increase 83% over the 1960 levels, while total vehicle miles traveled along the beltway are expected to jump from two to six times the 1960 levels.

These examples simply demonstrate the "motoring" phenomenon we're dealing with—that any expansion in roadway facilities or any measures undertaken to reduce congestion simply generates increased automobile trips and leads to more congestion. A State should not adopt traffic flow measures unless it also proposes motor vehicle restraints which will operate on the same roadways where speed is to be increased.

There are problems other than air pollution which should be considered before embarking on traffic flow measures. Higher travel speeds, particularly on crowded multi-laned turnpikes, compound the damage and injuries sustained in collisions. The public also should consider the tension-producing effects of cars whizzing at high speeds through business districts. Even where roadways are not bordered by pedestrian walks, they are close to houses, office buildings, parks, and city streets where people are working, shopping, or trying to relax. Any substantial increase in traffic speeds may increase noise levels. Besides the serious effects of noise on human health, increased background noise, such as that from highways, prevents or inhibits the normal exchange of information whether for business, pleasure, or in the classroom.

One final consideration in weighing the effects of traffic flow measures: any measure that increases traffic movement and average speeds may deter the public from employing mass transit services as well as alternate non-polluting modes of transportation—i.e. walking and bicycling. In fact, most traffic flow measures are specifically designed to prohibit pedestrian crossings or movement adjacent to the roadway. Certainly everyone is familiar with the broad intersections with painted triangles in the center which do not provide any protection to the pedestrian from traffic moving in both directions. And consider the roadways which traverse residential areas and provide access to shopping centers, suburban offices and theaters, yet do not provide walkways to allow safe passage for the pedestrian. Rather than instituting traffic flow measures as in the past, the State should begin now to build bicycle lanes and construct walkways where such movement has been prohibited or hazardous. Such steps are particularly appropriate where the roadways which connected once-isolated suburban developments with the city's center are now lined with offices, shopping centers, banks and other facilities within easy walking or biking distance of residential communities.

H. *Conclusions*

Based on the above discussions, NRDC suggests that an essential component of any transportation control strategy is a combination of transit improvements, vehicle restraints, and complex source regulation. These measures can form an integrated traffic reduction strategy that can reduce air pollution as well as serve other environmental and human needs. This strategy should be complemented by measures to reduce individual auto emissions. However, these exhaust control measures should not be *substituted* for a traffic reduction strategy. While control devices to reduce auto exhaust are a valuable tool for abating automobile pollution, these measures *alone* do not constitute an adequate transportation control plan:

—in the short run, in-use effectiveness of mechanical control devices and maintenance is likely to be significantly below projected efficiency;

—in the long run these measures will not abate air pollution resulting from increasing automobile use;

—these measures do not represent a balanced approach to urban transportation needs which is necessary to avert other environmental hazards: noise, space limitations, increasing congestion, loss of mobility for non-auto owners, and land-intensive suburban sprawl.

VIII. CITIZEN ACTION

There are two major areas for action if you want to develop a sound transportation control strategy for your State. First, there is the public hearing on the State's proposed plan. This hearing must be held before the State submits its plan to EPA on February 15, 1973. Second, there is the period of EPA review of your State's plan.

A. *Information*

Prior to participating in the hearings, you will need to prepare yourself to deal with the issues. First, you should have some familiarity with the health effects of pollution. Two useful sources are the "Air Pollution Primer" published by the National Tuberculosis and Respiratory Disease Association, and the "Air Pollution Workbook" put out by the Scientists' Institute for Public Information. For detailed information on the harmful effects of those pollutants now listed by EPA, federal Criteria Documents are valuable. See the bibliography for listings of these and other sources.

Second, learn the specifics of auto pollution in your city:

—the amount of total CO, NO_x and HC emissions attributed to motor vehicle exhaust

—the areas of highest pollutant concentrations (central business district, freeways, industrial plant locations, shopping districts, etc.)

—the types of vehicle that contribute the largest amounts of these pollutants (trucks, private autos, taxis)

—the particular driving patterns that generate these emissions (work trips, truck delivery, shopping trips, through-traffic, etc.).

If you live in one of the 14 cities listed below, an EPA Contractor has already collected this data for you. Ask your EPA Regional Office for the study.[49]

All of this information should be included in your State's implementation plan. If it is not included, or if the data is incomplete, you should immediately contact your local and State air pollution agency as well as the transportation representative in the EPA Regional Office (see list of addresses and phone numbers, p. 51). Point out to the authorities that the plan will be considered inadequate if this information is not included (see the discussion of Guidelines, p. 17) and that steps must be taken to collect the information *before* the plan is presented at the public hearing and submitted to EPA.

Besides the problem of air pollution in your area, you should gather as much information as possible on particular aspects of the transportation system in the community. This information will lead to a better understanding of whether proposed measures will be effective, as well as provide support for particular strategies you would like to see implemented.

[49]TRW, Inc. has done studies on Dayton, Denver, Houston-Galveston, Los Angeles, New York, Philadelphia and Phoenix. GCA Corp. has studied Baltimore, Boston, Spokane, Salt Lake City, Seattle, St. Paul, and Pittsburgh. Each of these studies proposes a specific transportation control strategy for each city.

Try to find out:

—how much parking space is available in the CBD; request a breakdown for on-street and off-street parking, private and public facilities, proposed construction of parking facilities, local zoning laws concerning this construction, average parking rates;

—the extent of transit service in your city; the number of buses, travel time, frequency of service on various lines, extent of service provided to suburban neighborhoods, number of riders, proposals already underway to extend or cut-back service, special services provided (if any) for shoppers, for sports and cultural events;

—the number of automobiles registered in the area compared to the population; the vehicle age mix of the automobiles;

—the estimated capacity of existing roadways and turnpikes and the current use (i.e., filled to 90% of capacity);

—information on the average auto trip in your city: length (in most downtown areas, trips are notoriously short, ½ to ¼ mile), average speed, etc.

If you cannot get this information from the plan or from the local, State, or federal pollution control agency in your area, then contact the state and local Highway Department or Department of Transportation, the local transit service, the Bureau of Motor Vehicles (registration statistics) and even the local Tax Commissioner's office (which has breakdowns of parking facilities for purposes of property taxing).

Know your control authorities. You will come into contact with three levels of pollution controllers in your efforts: local, State, and EPA regional officials. Ask to attend their meetings if any are being held before the hearing. Becoming acquainted with EPA regional personnel and procedures is particularly important since it is the Regional EPA Office which will review your State's plan.

However, your first concern should be with the State agency or agencies responsible for writing and submitting the implementation plan for your AQCR. If your region is an interstate one, remember that each State involved must submit a plan for its part of the region, but that these plans must be coordinated. You will want to pay attention to the plans for all parts of your AQCR and this will mean knowing all the agencies responsible for the plans, as well as any interstate authorities.

Naturally, you will not have time to accomplish all of the above tasks in the short time remaining before the hearings if you are beginning from scratch. You might consider contacting other individuals and groups which share your interest and divide the work among you. The EPA Regional Office may have the names of groups in your area. The Regional Office also may be able to inform you if any workshops will be held in your city.

B. *Get the Proposed Plan*

To make an adequate assessment of a proposed implementation plan and have real influence on its final content, it is essential that you obtain copies of the proposal as soon as possible, before the hearings.

Section 51.4(b) of the federal Guidelines requires State agencies to give "reasonable notice" of hearings on proposed plans. "Reasonable notice" includes, at least 30 days prior to the date of the hearing(s):

> —Notice given to the public by prominent advertisement announcing the date(s), time(s), and place(s) of such hearing(s) and the availability of the principal portions of the proposed plan, including, as a minimum, all rules and regulations which are proposed to be included in such plan, for public inspection in at least one location in each region to which the plan will apply.

If your State's plan is to be submitted by Feb. 15th, then hearings should take place in the next few weeks and notice should have already been made. However, as this manual goes to press, several States have still not set hearing dates. Check with your Regional EPA trans-

portation representative to find out if your State has set a date—if not, or if thirty days' notice is not provided, then press for a later hearing date, even if it means the plan is submitted late. Where States are operating under time restraints it is more important that the public receive sufficient notice and as much time as possible to review the proposed plan *before* the hearing, than for the plan to be submitted by the Feb. 15th deadline.

The most important parts of the plan will deal with the selection of particular control strategies, demonstration of the adequacy of the selected strategies, and summaries of the supporting data used to justify each choice. The proposed rules and regulations for carrying out these strategies may not even be ready in time for the hearing—much less thirty days prior to the hearing date. Where the State is unable to make this portion of the plan available in time, separate hearings to consider the proposed rules and regulations must be held at a later date before this portion of the plan can be submitted to the regional EPA office. If your State may object to this. If so, protest to your Governor, the EPA Regional Office and the press. Let NRDC know too.

Many EPA Regional Offices have agreed to reproduce copies of the plans for citizens. Urge your Regional Office to do so.

C. *Prepare a Critique of the Proposed Plan*

The next step is to analyze the proposed plan and prepare a critique. Time short and you may be in the uncomfortable position of the layman criticizing procedures even the experts are not sure about. You can reassure yourself and add weight to your testimony by getting the volunteer assistance of engineers, scientists, doctors, or lawyers. Seek them out in local graduate schools. Try the environmental law committee of the State Bar Association or the local Sierra Club chapter.

It is important to remember that, even with no technical or legal help at all, citizens are capable of reviewing key elements of proposed plans and making substantial constructive criticisms.

Your critique should approach the plan from four main points:

1. Air Quality Data.

Determine if necessary data is included and if the sources are reliable. Check to see that air quality monitoring is done at the heaviest traffic points and at *street level where pedestrians are affected.*

2. Choice of Strategies.

Carefully look over the discussion of strategies the State considered and rejected; considerations of economic impact, cost effectiveness or political/legislative problems are not legally sufficient grounds to reject any strategy. Outline as specifically as you can the strategies you think should be included in the State plan, including as much hard data as you have available to substantiate the effectiveness of your alternative or additional measure. The most important strategies are those to improve mass transit, to restrict private vehicle use, and to regulate new traffic-generating construction.

3. Date for Attainment.

The State plan should aim for achieving national ambient air quality standards by 1975 (see discussion of deadlines and extensions, p. 11). It is the responsibility of the State to demonstrate that no combinations of practicable control measures (including those citizens suggest) result in the necessary reductions by 1975. Only then is a request for extension to 1977 warranted.

4. Enforcement.

Check that detailed enforcement procedures are outlined for each proposed strategy. (Discussion, p. 14.) Then be sure that the budget allotments are to each responsible agency

seem reasonable. The State should never assign new duties or areas of enforcement to any agency without providing funding for additional manpower to carry out these tasks. Assess the adequacy of the plan's monitoring and surveillance procedures.

D. *Questions to Keep in Mind When Reviewing Your State's Plan*

1. Does emission data reflect any recent increase in pollution levels? Has it been taken into account?
2. Were air samples taken at the heaviest intersections? At street level?
3. Do the reductions from each strategy add up to total reductions necessary to attain national standards with an adequate margin for error?
4. Do selected strategies reduce overall emissions to levels low enough that national standards are not exceeded more than one day a year (or does the plan call for variable control—alerting motorists on "bad" days—an ineffective approach)?
5. Will the strategies attain national standards by 1975? If not, has the State demonstrated that no strategies are available to meet standards by 1975?
6. Does the plan demonstrate that the strategies are adequate to *maintain* standards after 1975?
7. Does the plan provide detailed procedures for instituting control measures and enforcing them?
8. Are allocations ($) for enforcement agencies sufficient?
9. Does the plan describe procedures for monitoring the actual reductions achieved after control measures are implemented?
10. Does your State have adequate legal authority to carry out its plan?
11. Are adequate measures included to reduce the total VMT in the area?
12. Does the plan provide for a balanced approach to urban transportation needs, by improving mass transit, providing demand-responsive systems, and extending services to suburban communities?
13. Does the plan provide for regulating "complex sources," abandoning future urban highway construction, regulating the construction of new parking facilities?
14. If traffic flow strategies are included, are they accompanied by adequate vehicle restraints?

E. *Hearings*

Appearance at the hearings will serve two purposes: to influence the content of the proposed plan and to serve notice that concerned citizens will be watching its implementation and enforcement.

In many States officials are predicting a citizen backlash: disgruntled citizens anxious to fight any impingement on their present use of the automobile. This makes it more important for citizens who are concerned with the environmental damage caused by the automobile on our cities to arrange for solid citizen support at the hearings, and inform the community at large of the problems and solutions to automobile pollution.

Arrange for witnesses to present your critique at the hearings. If lawyers, scientists, engineers or doctors have helped prepare the arguments, have them testify to lend maximum weight to your presentation. Make sure that the full text of your arguments, including whatever detailed material is necessary to back them up, is submitted as testimony in such a way that it appears in full in the transcript of the hearings. Your objections may provide for eventual overturning of an inadequate plan.

Stimulate as large a public turnout at the hearings as possible to support your views. If you do not think the agency has given adequate notice of the hearings, do it yourself. Urge

other citizens' groups to appear at the hearings. If they are not preparing their own testimony, try to get them to make statements supporting yours. If they cannot appear at the hearing, have them mail their statements in. Statements presented in writing, even by mail, become part of the record just as if presented in person.

F. *After the Hearings*

Unlike the previous review of your State's plan, the EPA review of the transportation plan will be the primary duty of the EPA Regional Office. You should make every effort to press your arguments against the plan to the Regional Office. Contact the Regional Transportation Representative (see list p. 51), the Regional Counsel, and the Regional Administrator.

Last year's review of plans by EPA was essentially a process of bilateral negotiation between EPA and the State, with the public effectively frozen out of decision-making regarding the acceptability of the State's plan. A repetition of this closed process can be avoided simply by making your presence felt at the Regional Office. Find out EPA's preliminary views of the adequacy of your State's plan. Respond in writing to EPA's positions.

Added to these contacts should be an insistence that EPA develop structured procedures to guarantee citizen participation in the EPA review process. These procedures should include placing all correspondence between the State and EPA in the public file without delay and provision of these materials on request. Second, EPA should make its plan reviewing personnel available for meetings with citizens. Efforts should be made to get EPA to issue its decision on approval or disapproval as a notice of proposed rule making, providing opportunity for comment, preferably at a public hearing.

If it appears that EPA feels the plan should be disapproved, urge the agency to publish its disapproval before the end of the four-month review period. If this is done, the process of proposal and promulgation of substitute plan regulations may be accomplished on time rather than months behind schedule as has been EPA's practice.

If you have complaints or difficulties in your dealings with the Regional Office, express your dissatisfaction to EPA Washington headquarters. The headquarters Office of Air and Water Programs and the Office of General Counsel will be overseeing the Regional Office's review process.

Most important, keep in mind that effective citizen pressure on EPA can make a difference in the results of its review. If a coalition of groups and citizens from a community expresses a strong desire for a public meeting to discuss EPA's review, the agency is likely to accede. If you persevere with the EPA Regional Office, you may accomplish much that was not achieved before the State submitted its plan.

IX. APPENDICES

APPENDIX A

NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

Pollutant	Primary Standard	Secondary Standard
Carbon Monoxide:	(a) 10 milligrams per cubic meter (9 p.p.m.)—maximum 8 hr. concentration not to be exceeded once a year. (b) 40 milligrams per cubic meter (35 p.p.m.)—maximum 1-hr. concentration not to be exceeded more than once a year.	Same as Primary Standard.
Hydrocarbons:	160 micrograms per cubic meter (0.24 p.p.m.)—maximum 3-hr. concentration (6 to 9 a.m.) not to be exceeded more than once per year.	Same as Primary Standard.
Nitrogen Dioxide:	100 micrograms per cubic meter (0.05 p.p.m.)—annual arithmetic mean.	Same as Primary Standard.
Photochemical Oxidants:	160 micrograms per cubic meter (0.08 p.p.m.)—maximum 1-hr. concentration not to be exceeded more than once per year.	Same as Primary Standard.

APPENDIX B

CITIES SUBMITTING TRANSPORTATION CONTROL STRATEGIES FEB. 15, 1973[1]

CITIES	EPA REGION[3]	EXTENSION TO 1977
Fairbanks, Alaska	X	NO
Phoenix, Arizona	IX	YES
Tucson, Arizona	IX	YES
San Francisco, California	IX	YES
[2] Los Angeles, California	IX	YES
San Diego, California	IX	YES
Sacramento, California	IX	YES
Fresno, California	IX	YES
Denver. Colorado	VIII	YES
Washington, D.C.	III	NO
Chicago, Illinois	V	NO
Baltimore, Maryland	III	YES
Boston, Massachusetts	I	YES
Minneapolis-St. Paul, Minnesota	V	YES
New York City, New York	II	YES
Dayton, Ohio	V	YES
Portland, Oregon	X	NO
Philadelphia, Pennsylvania	III	YES
Pittsburgh, Pennsylvania	III	YES
Austin, Texas	VI	YES
Corpus Christi, Texas	VI	YES
Dallas-Fort Worth, Texas	VI	YES
El Paso, Texas	VI	YES
Houston-Galveston, Texas	VI	YES
San Antonio, Texas	VI	YES
Salt Lake City, Utah	VIII	YES
Arlington, Virginia	III	NO
Seattle, Washington	X	YES
Spokane, Washington	X	YES

[1] New Jersey and Nevada also need transportation controls to meet national standards, but they submitted transportation control plans last January. Those plans will now be subject to the requirements of the amended guidelines; however, EPA has not yet required these States to resubmit their plans.

[2] EPA is to propose a plan for L.A. by January 15, 1973.

[3] See p. 51 for addresses of EPA Regional Offices.

APPENDIX C

THESE STATES WOULD NEED TRANSPORTATION CONTROLS TO MEET STANDARDS BY 1975 BUT HAVE BEEN GRANTED EXTENSIONS TO 1977.[1]

CITIES	EPA REGION
Birmingham, Alabama	IV
Mobile, Alabama	IV
Indianapolis, Indiana	V
Kansas City, Kansas	VII
Springfield, Massachusetts	I
Kansas City, Missouri	VII
Central New York	II
Genesee-Finger Lakes, New York	II
Toledo, Ohio	V
Cincinnati, Ohio	V

[1] EPA argues that the States can meet the standards by 1977 without transportation controls; however, if the EPA extension is overturned by the courts, these States will have to submit transportation control plans, and this manual will apply to them.

APPENDIX D

DEADLINES FOR OBTAINING LEGAL AUTHORITY

STATE	LEGAL AUTHORITY REQUIRED BY	ADOPTED REGS. REQUIRED BY
Alaska	July 1, 1973	Dec. 30, 1973
Arizona	July 30, 1973	Dec. 30, 1973
California	Dec. 31, 1973	Mar. 31, 1974
Colorado	Dec. 31, 1973	Dec. 31, 1973
District of Columbia	July 30, 1973	Dec. 30, 1973
Illinois	July 30, 1973	Dec. 30, 1973
Maryland	June 30, 1974	Dec. 30, 1974
Massachusetts	June 30, 1974	Dec. 30, 1974
Minnesota	July 30, 1973	Dec. 30, 1973
New York	July 30, 1973	Dec. 30, 1973
Ohio	July 30, 1973	Dec. 30, 1974
Oregon	Dec. 30, 1973	Dec. 30, 1973
Pennsylvania	July 30, 1974	Dec. 30, 1974
Texas	July 30, 1973	Dec. 31, 1973
Utah	July 30, 1973	Dec. 30, 1973
Washington	July 1, 1973	Dec. 30, 1973

APPENDIX E

EPA REGIONAL OFFICES

REGION I
John F. Kennedy Federal Building
Room 2303
Boston, Massachusetts 02203

Transportation Representative: Wally Woo: (617)223-4636

REGION II
26 Federal Plaza
Room 908
New York, New York 10007

Transportation Representative: Tim Dwyer: (212) 264-9867

REGION III
Curtis Building
6th & Walnut Streets
Philadelphia, Pennsylvania 19106

Transportation Representative: Chuck Miesse: (215) 597-9399

REGION IV
1421 Peachtree Street, N.E.
Atlanta, Georgia 30309

Regional Air Pollution Control Dir.: Tommie A. Gibbs: (404) 526-3043

REGION V
1 North Wacker Drive
Chicago, Illinois 60606

Transportation Representative: Jack Chicca: (312) 353-6942

REGION VI
1600 Patterson Street
Suite 1100
Dallas, Texas 75201

Transportation Representative: John Crocker: (214) 749-1231

REGION VII
Room 249
1735 Baltimore Avenue
Kansas City, Missouri 64108

Chief, Air Program Support Branch: Dewayne E. Durst: (816) 374-3791

EPA REGIONAL OFFICES (CONT.)

REGION VIII
1860 Lincoln Street
Suite 900
Denver, Colorado 80203

Transportation Representative: Dale Wells: (303) 837-4831

REGION IX
100 California Street
San Francisco, California 94111

Transportation Representative: Ron Mueller: (415) 556-2332

REGION X
1200 6th Avenue
Seattle, Washington 98101

Transportation Representative: Jerry Kurtzweg: (206) 442-1226

APPENDIX F

BIBLIOGRAPHY

Government Publications:

1. The Clean Air Act (42 U.S.C. 1857 et. seq.).

2. EPA, "The National Primary and Secondary Ambient Air Quality Standards" 40 Code of Federal Regulations, Part 50, 36 *Federal Register* 8186.

3. EPA, "Requirements For Preparation, Adoption, And Submittal Of Implementation Plans" (Federal Guidelines) 40 Code of Federal Regulations, Part 51, 36 *Federal Register* 22398 (Nov. 25, 1971), and amendments to Part 51, 38 *Fed. Reg.* 1464 (Jan. 12, 1973).

   [The above documents can be ordered through: Environmental Protection Agency, Public Affairs, Public Inquiries Branch, 4th & M St., S.W., Washington, D.C. 20460. They are available free of charge. In quantities of over 10, however, there is a waiting period of about two weeks.]

4. Senate Committee on Public Works, "National Air Quality Standards Act of 1970", *Sen. Rpt.* No. 91-1196, 91st Cong., 2d Sess. (1970).

   [The above document can be ordered from the Committee itself: Committee on Public Works, 4202 New Senate Office Building, Washington, D.C. 20510. It is free of charge, but available in limited amounts only. It can also be ordered from the Government Printing Office.]

5. Air Quality Criteria Documents:
   —Carbon Monoxide, GPO No. HE 20.1309:62
   —Photochemical Oxidants, GPO No. HE 20.1309:63
   —Hydrocarbons, GPO No. HE 20.1309:64
   —Nitrogen Oxides, GPO No. EP 4.9:84.

6. EPA, *Control Strategies for In-Use Vehicles* Office of Air and Water Programs, Mobile Source Pollution Control Program, Washington, D.C. 20460 (Nov., 1972).

7. EPA, *Evaluating Transportation Controls to Reduce Motor Vehicle Emissions in Major Metropolitan Areas* (Nov. 20, 1972). Air Pollution Technical Information Center, Research Triangle Park, N.C.

Other Publications:

1. *Air Pollution Primer*, National Tuberculosis and Respiratory Disease Association, 1969—A clear, concise introduction to the problem of air pollution.

   [Order from your local T B & R D Association. Copies are free of charge.]

2. *Air Pollution Workbook*, Scientists' Institute for Public Information, (1970). Lucid, short explanations of the atmosphere, characteristics of specific pollutants and biological effects of pollution.

   [Order from: Scientists' Institute for Public Information, 30 East 68th Street, New York, N.Y. 10021. Available at $1.00 per copy.]

3. *Action for Clean Air:* A Manual for Citizen Participation in State Implementation Plan Proceedings Under the Clean Air Amendments of 1970.

   [Order from: Project on Clean Air, Natural Resources Defense Council, Inc., 36 West 44th St., New York, N.Y. 10036.]

ATTACHMENT 3

NATURAL RESOURCES DEFENSE COUNCIL, INC.
NEWSLETTER

WINTER 1971

Page xxvii

"CITIZEN SUITS UNDER THE
CLEAN AIR ACT AMENDMENTS OF 1970"

CITIZEN SUITS UNDER THE CLEAN AIR ACT AMENDMENTS OF 1970*

Richard E. Ayres
James F. Miller

The provision allowing citizen suits is among the most significant improvements in federal air pollution law made by the 1970 Amendments to the Clean Air Act. It was the intention of Congress to include private citizens as much as possible in the implementation and enforcement of the Clean Air Act, and to that end Section 304 of the Act allows any citizen to bring a civil suit in federal court against any polluter or governmental agency, including the federal Environmental Protection Agency, for failure to comply with the Act. The provision allows judges to award attorney's fees and litigation costs to citizen plaintiffs. The purpose of this article is to examine the citizen suit provision. Though the provision gives citizens access to a broad new range of actions, it has distinct limitations. We will describe these limitations and explore the uses to which the provision can be put, and discuss some of the problems citizen plaintiffs will face in using it.

I. PARTIES AND REMEDIES

Section 304 of the Clean Air Act gives any individual, corporation, partnership, association, state, municipality, or political subdivision of a state the right to sue in federal district court to enjoin violations of the Act and the state implementation plans under it.[1] This large class of potential plaintiffs is limited in only two ways. A citizen may not sue a state in which he does not reside and he may not sue when the federal EPA Administrator or the state is "diligently prosecuting" a civil action in a state court. If the Administrator or the state is diligently prosecuting a suit in the federal courts, the citizen also may not sue on his own behalf, but he may intervene as a matter of right and so become a full party to the suit.[2]

The federal district courts are given jurisdiction over citizen suits regardless of the amount in controversy or the citizenship of the parties, and the plaintiff need allege no special damage to himself or herself, or to a class. "Any person" may be named as defendent by a citizen plaintiff.[3]

The Act gives the citizen the right to sue a polluter or the federal Administrator for an injunction, or the Administrator in mandamus when he is not performing his duty, but it does not grant the right to sue for damages.[4] However, Section 304 does not preclude suits for damages against polluters. It explicitly retains all other rights a citizen plaintiff has under state and federal law,[5] including class actions and traditional common law actions – e.g., private (and in some

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1 Section 302(e), 42 U.S.C. §1857h(e).

2 Section 304(b)(1)(B), 42 U.S.C. §1857h-2(b)(1)(B).

3 Section 302. 42 U.S.C. §1857h. The only limit is the federal Eleventh Amendment.

4 Section 304(a)(1) & (2), 42 U.S.C. §1857h-2(a)(1) & (2).

5 "Nothing in this section shall restrict any right which any person (*or class of persons*) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek *any other relief* (including relief against the Administrator or a State agency)." [emphasis supplied] Section 304(e), 42 U.S.C. §1857h-2(e).

states, public[6] nuisance actions.[7]

II. JURISDICTION

Section 304 confers jurisdiction on federal district courts to enforce a state or federal emission standard or limitation, or an order issued pursuant to such a standard or limitation. It also gives the court the power to order the Administrator to perform a mandatory duty under the Act.[8]

Suits concerning a stationary source of pollution must be brought in the district where the source is located. Section 304 is silent as to which district courts will have jurisdiction over suits involving automobiles, airplanes and other moving sources, but presumably a citizen may bring suit in any district in the United States, subject only to traditional notions of *forum non conveniens*[9] and the rules governing personal jurisdiction.[10]

III. PROCEDURE FOR BRINGING SUIT – NOTICE

Citizen plaintiffs must give notice before bringing suit. Suit immediately following notice is allowed when the citizen plaintiff alleges

- an emission of a hazardous air pollutant in excess of the national standard promulgated under Section 112 by the Administrator;[11]
- a violation of an order issued by the federal Administrator under Section 113(a) of the Act.[12]

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6 The Second Restatement of Torts is presently recognizing broader rights in private citizens to sue in public nuisance.

7 Subsection 304(e) also raises an interesting question which neither the Clean Air Amendments nor their legislative history answers: can a judgment in a Section 304 citizen suit serve as a basis for summary judgment in a subsequent class action or nuisance suit for damages against the same defendant? There would seem to be no reason why the findings in the Section 304 suit would not be *res judicata* against the same defendant in a subsequent action for damages. (The converse is clearly not true. "Compliance with standards under this Act would not be a defense to a common law action for pollution damages." Senate Comm. on Public Works, Subcomm. on Air and Water Pollution, *National Air Quality Standards Act of 1970*, Sen. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970). [hereinafter "Sen. Rep."].) Whether these findings could serve as the basis for summary judgment depends on the similarity of the issues before the subsequent court. In a Section 304 suit against a polluter, the issue before the federal court would be whether the polluter has violated an applicable "emission standard or limitation." In a nuisance action, however, the issue is often whether the defendant's conduct constitutes an "unreasonable" interference with the plaintiff's health or the use of his property, and proof that he violated an applicable emission standard or limitation might not necessarily be considered dispositive on this issue.

On the other hand, a court might accept the argument that violation of an emission standard or limitation amounted in law to damage to health or property, since the emission standards and limitations promulgated by state agencies must, by federal law, be set at levels which will attain the National Air Quality Standards, and these standards have been set to protect public health and welfare. Section 109, 42 U.S.C. §1857c-4; Section 110(a)(2)(B), 42 U.S.C. §1857c-5(a)(2)(B).

8 Section 304(a), 42 U.S.C. §1857h-2(a). *See III, infra*, for a discussion of the causes of action covered by this jurisdiction.

9 *See* Fed. R. Civ. P., Rule 12(b)(3).

10 There is typical federal question jurisdiction and thus, presumably, a state agency can bring suit against an agency of a neighboring state, if the neighboring state is in a period of "federally assumed enforcement" under Section 113(a)(2), 42 U.S.C. §1857c-8(a)(2). Such a suit would not appear to be in contravention of the Eleventh Amendment, and under Article III of the Constitution, the judicial power of the United States would extend to such a suit. There would be some question, however, of whether original jurisdiction resided in the federal district courts, or in the United States Supreme Court.

11 National emission standards for hazardous pollutants have been proposed by the Administrator, at this writing, for asbestos, beryllium, and mercury. 36 F.R. 23239 (December 7, 1971). Final emission standards must be promulgated by the Administrator not later than 180 days after the date of publication. Other hazardous substances may be added to the list in the discretion of the Administrator, pursuant to the procedures of Section 112, 42 U.S.C. §1857c-7.

12 Section 113(a) provides for three different types of orders:

(1) against a violator of a state implementation plan. If the Administrator finds that a polluter is in violation, and the violator fails to comply with the plan within 30 days after being notified by EPA, the Administrator may issue a compliance order; and,

Sixty days' notice to the defendants is required in suits alleging

- a violation of an "emission standard or limitation" (other than a hazardous pollutant standard) (i.e., a violation of a state emission standard or limitation, or a federal new source performance standard);[13]
- a violation of an order "with respect to" an emission standard or limitation;[14]
- a failure by the federal Administrator to carry out a non-discretionary duty under the Act.[15]

In suits against a polluter or a state, the plaintiff must give notice to (1) the federal Administrator;[16] (2) the regional Director of the federal Environmental Protection Agency for the region in which the violation occurred;[17] (3) an authorized representative of the state agency charged with responsibility for air pollution control in the state where the violation occurred;[18] and (4) the owner or managing agent of the facility, if any, alleged to be in violation of the Act.[19] In a suit against the federal Administrator, the citizen need give notice only to the Administrator himself.[20]

The form of the notice has purposely been made simple. Congress did not intend this requirement to be burdensome,[21] and the Administrator's regulations have carried out this intent.[22] Notices must only identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to be in violation, the persons responsible for the violation, the location and dates of the violation, and the name and address of the person giving notice.[23] Notice to the Administrator alleging a failure to carry out a non-discretionary duty must specify the provision of the Act creating the duty, the action or omission alleged to be in violation, and the name and address of the person giving notice.[24]

It is difficult to predict what effect the notice provision of Section 304 will have. In suits against polluters it may not be as benign as it would first appear. It is possible, of course, that a citizen's notice of intention to sue may spur a laggard polluter to comply with state regulations, thereby accomplishing the purposes of the Act with minimal expense to the citizen. On the other hand, Section 304(b)(1)(B) provides that if a state or the federal Administrator has commenced and is "diligently prosecuting" a civil suit against the violator, the citizen may not bring a separate suit. This presents no problem where the federal Administrator has brought suit, because a citizen may intervene in the federal suit as a matter of right. But where a state has brought suit the citizen has no such right.[25] Thus state officials could hurriedly bring their own suit

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(2) against a violator, during a period of "federally assumed enforcement." If the Administrator finds that violations of an applicable state implementation plan are so widespread that they appear to result from a failure of the state to enforce the plan, the Administrator may, after notice to the state, enforce any requirement of the plan by, *inter alia*, issuing a compliance order;

(3) against any person for violating standards for new sources under Section 111, standards for hazardous pollutants under Section 112, or any requirement of the federal monitoring and information provision, Section 114.

13 Section 304(b)(1)(A), 42 U.S.C. §1857h-2(b)(1)(A).

14 *Id.*

15 Section 304(b)(2), 42 U.S.C. §1857h-2(b)(2).

16 Section 304(b)(1)(A)(i), 42 U.S.C. §1857h-2(b)(1)(A)(i).

17 40 CFR Part 54 [formerly 42 CFR Part 415], §54.2(a), 36 F.R. 23386 (December 9, 1971).

18 Section 304(b)(1)(A)(ii), 42 U.S.C. §1857h-2(b)(1)(A)(ii) & 40 CFR §54.2(b).

19 Section 304(b)(1)(A)(iii), 42 U.S.C. §1857h-2(b)(1)(A)(iii) & 40 CFR §54.2(c).

20 Section 304(b)(2), 42 U.S.C. §1857h-2(b)(2).

21 Sen. Rep. at 37.

22 40 CFR Part 54, 36 F.R. 23386.

23 40 CFR §54.3(b), 36 F.R. 23387.

24 40 CFR §54.3(a), 36 F.R. 23387.

25 The state may stay the citizen's right to bring suit under Section 304 by bringing suit in either federal or state court.

against a polluter upon receiving notice of an impending citizen suit. It might be some time later before a citizen would be able to convince a federal judge that the state was not "diligently prosecuting" the suit, and considerable delay might ensue.

IV. CAUSES OF ACTION

Citizens may seek redress in court for (A) violations of an "emission standard or limitation in effect under the Act," (B) violations of an order issued by the federal Administrator or a state "with respect to such a standard or limitation," or (C) failure of the Administrator to perform a non-discretionary duty.[26]

A. Emission Standards and Limitations

The Act includes within the term "emission standard or limitation in effect under this Act"

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, and

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

"which is in effect under this Act . . . or under an applicable implementation plan."[27]

The second half of the Act's definition of "emission standard or limitation in effect under this Act" is "a control or prohibition respecting a motor vehicle fuel or fuel additive."[28] Section 211 (c) of the Act allows both the Administrator and states, under certain conditions, to regulate fuels and fuel additives. EPA has recently proposed regulations governing phosphorus and lead additives to gasoline.[29]

The first definition divides into two parts: emission limitations, standards of performance and emission standards form one category; schedules and timetables of compliance another.

As they are used in the Act and EPA regulations, the terms emission limitation, standard of performance and emission standard are virtually interchangeable. The Act makes no effort to distinguish the terms from one another and defines only one.[30] The most common form of air pollution control is a limit on allowable emissions of the pollutant per unit of input to, or output from, the process that produces the pollutant. Sulfur dioxide emissions from fossil fuel electric plants, for example, are commonly limited to a certain number of pounds of sulfur dioxide per million B.t.u.'s of heat input to the boiler, and nitrogen oxides emissions from nitric acid plants are restricted to a certain number of pounds per ton of acid produced. This type of emission restriction may also be measured against time, and may even call for a total elimination of emissions. Compliance with such measures is usually checked by measuring at some point on the source through which all emissions must pass, such as the stack, but other kinds of measurement are also used. Visible emissions are commonly limited to a specific opacity or prohibited altogether. Other measures set concentrations of the pollutant that may not be exceeded in the ambient air near the source.[31]

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26 Section 304(a)(1) & (2), 42 U.S.C. §1857h-2(a)(1) & (2).

27 Section 304(f), 42 U.S.C. §1857h-2(f).

28 *Id.*

29 36 F.R. 3882 (February 23, 1971).

30 Section 111(a)(1), 42 U.S.C. §1857c-6 states that, for the purposes of that section:" 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." This definition does nothing to distinguish standard of performance from the other two terms.

31 Such restrictions on emissions, usually measured at the property line of the source, should not be confused with ambient air quality standards. The latter are maximum permissible concentrations of pollutants that will be allowed to occur throughout a given geographical region. Since all the sources in such an area contribute to the ambient concentration of a pollutant within the area, it cannot be said that ambient air quality standards are intended to directly limit the emissions of individual sources. Instead, Section 110 directs states to impose a set of "emission limitations" and other control measures on individual sources that will result in collective achievement of the National Air Quality Standards.

A second type of control measure places conditions directly on the operation of the source, instead of on the content of the emission stream. Such measures usually require use of specific kinds of fuels or raw materials, specific machinery and operating procedures, or modifications of operating schedules. A common process requirement is to limit the sulfur content of coal or oil burned in various kinds of equipment. Processes like asbestos spraying may also be prohibited entirely.

A third type of control measure requires use of a specific emission control device or of a substitute device that will produce equivalent control.

Emission limitations, standards of performance and emission standards may be imposed directly under the Act or under state implementation plans. Five groups of such restrictions are now or will be in effect under the Act:

1. Section 111 requires the federal EPA Administrator to set standards of performance for any category of stationary sources of air pollution that endangers public health or welfare. These standards apply only to newly constructed or modified sources. Final standards for five categories of sources were published on December 23, 1971.[32]

2. Section 112 requires the Administrator to set emission standards for pollutants for which no National Air Quality Standard has been set and which cause or contribute to "an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." Proposed standards for three hazardous pollutants were published on December 7, 1971.[33]

3. Section 111 also requires that, if any standards of performance for new sources extend to pollutants for which there is no National Air Quality Standard and no standard set under Section 112, states must submit to EPA plans under which they will control emissions of that pollutant from *existing* sources. These plans must set emission standards for the pollutant which the state must then enforce. EPA is expected to propose guidelines for submission of these plans in the coming months.[34]

4. Section 202 requires the Administrator to set emission standards for classes of motor vehicles and engines that cause or contribute to pollution that endangers the public health and welfare. Standards applicable to the 1975 and 1976 model years for emissions of carbon monoxide, hydrocarbons and nitrogen oxides from light duty vehicles and engines were set on July 2, 1971.[35]

5. Section 231 requires the Administrator to set emission standards for pollutants from classes of aircraft and aircraft engines that cause or contribute to pollution endangering public health and welfare. No such standards have yet appeared.

State implementation plans also must include "emission limitations...and such other measures as may be necessary to insure attainment and maintenance" of the primary and secondary National Air Quality Standards.[36] Since only parts of a handful of state plans are now in effect, it is difficult to tell exactly what forms these emission limitations and other measures will take, but EPA's

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It is possible for a source to be held responsible for a violation of an ambient standard, but only in the special case where he contributes virtually all of a given pollutant in a region. In such a region, he might be held to have violated an ambient standard, even if he were in compliance with an emission limitation. This point could be an important one for citizen plaintiffs in presently clean areas where major sources of pollution – such as power plants – are proposed to be built.

32 36 F.R. 24876 (December 23, 1971).

33 36 F.R. 23239 (December 7, 1971).

34 Since these plans will not be part of the regular state implementation plans, any standards they contain will be in effect directly under the Act.

35 36 F.R. 12652 (July 2, 1971), 36 F.R. 22448 (November 25, 1971), 37 F.R. 669 (January 15, 1972). For a listing of regulations governing earlier model years, see 37 F.R. 784 (January 19, 1972).

36 Section 110, 42 U.S.C. §1857c-5.

guidelines indicate that the plans may contain the full range of measures described above. Appendix B to the guidelines lists emission limitations EPA thinks are attainable with reasonably available control technology.[37] The list includes, in addition to the common restrictions on the amount of emissions, various process requirements, requirements for use of certain fuels, and limitations on visible emissions. The guidelines also require that state plans incorporate, where necessary to attain National Air Quality Standards, changes in schedules or methods of operation and emission controls on in-use motor vehicles.[38]

The Act also includes "a schedule or timetable of compliance" within the general term "emission standard or limitation in effect under this Act." Such schedules and timetables may be in effect under either the Act or state implementation plans.[39] These terms are nowhere defined, but do appear in the Act's requirement that state plans include "emission limitations, schedules, and timetables for compliance with such limitations."[40] In addition to these, other schedules and timetables appear in the Act and EPA regulations promulgated under it, and state implementation plans are required to contain certain timetables other than those for compliance with emission limitations. All of these should be enforceable through the citizen suit provision.

The Act imposes deadlines directly on the states. States must submit their plans for achieving the primary and secondary National Air Quality Standards within nine months after these standards are set.[41] If the Administrator notifies a state that its plan must be revised to meet new developments in control technology or to correct its own faults, the state must act within 60 days (or such longer period as the Administrator may prescribe).[42]

Under the Act, EPA has promulgated regulations which impose other schedules and timetables on states and polluters. In the guidelines for state implementation plans:

- Sections 420.4(a) and 420.6(c) require 30 days public notice of hearings on proposed plans and revisions of plans.
- Section 420.7 requires submission by the state of quarterly reports to EPA on air quality and semiannual reports on progress in carrying out implementation plans.
- Section 420.15(a)(2) allows schedules for compliance with provisions of plans to be submitted after the deadline for submission of the rest of the plan, but no later than the deadline for the first semiannual report (February 15, 1973).
- Section 420.16(c) imposes the same deadline on submission of control programs for high-pollution emergencies.
- Section 420.16(f) allows a state to meet certain requirements for its high-pollution emergency procedures after submitting the implementation plan, provided that the state submits a timetable for meeting those requirements within a year after the plan submission deadline.
- Section 420.17 requires states to install an air quality monitoring network according to a specific timetable that is no longer than two years.
- Section 420.17(c) requires that air quality monitoring stations that will be used during high-pollution emergencies be operative within one year of the plan's approval.
- Section 420.31(e) requires that any state's request for an 18-month extension of the submission deadline for plans implementing secondary Standards must be made soon enough before the regular deadline to allow a suitable plan to be developed if the extension request is denied.

There is, finally, a particularly important timetable that is in effect under both the Act and every approved implementation plan. The Act places responsibility for achieving and maintaining the National Air Quality Standards on the states,[43] and requires them to submit plans providing for "implementation, maintenance, and enforcement" of the Standards within specified deadlines.[44] It can reasonably be said, therefore, that a state's failure to enforce an implementation plan constitutes failure to meet the National Standards according to the required timetable, and that the state can be sued under the citizen suit provision to compel enforcement of its plan.

Other EPA regulations will impose various deadlines on persons other than the states or the EPA Administrator. The regulations setting standards for categories of new stationary sources, for example, require performance tests within 60 days after startup of such sources and further tests in accordance with a timetable set by the Administrator.[45] Similarly, proposed regulations for hazardous pollutants prescribe timetables according to which emission tests must be conducted and information submitted to EPA.[46]

B. Orders Concerning Emission Standards and Limitations

The Act also allows citizen suits against any person for alleged violation of "an order issued by the Administrator or a State with respect to [an emission] standard or limitation."[47] The Act allows the Administrator to order compliance with implementation plans, with standards of performance for new stationary sources (set under Section 111), and with emission standards for hazardous pollutants (set under Section 112).[48] Most states are also allowed, and in some cases compelled, to issue similar orders under their own air pollution laws and regulations.[49]

Finally, the Act allows the Administrator to require certain kinds of monitoring, record-keeping, and reporting activities by source owners and operators in order to ascertain compliance with implementation plans and standards set under Sections 111 and 112. State implementation plans will contain similar requirements. These activities are related closely enough to emission restrictions and to timetables so that an order from the Administrator or a state requiring their performance would qualify as "an order with respect to an emission standard or limitation under this Act," and thus be enforceable under Section 304.

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37 36 F.R. 15486, 15495 (August 14, 1971).

38 42 CFR §420.1(n), 36 F.R. 15486.

39 Section 304(f), 42 U.S.C. §1857h-2(f).

40 Section 110(a)(2)(B), 42 U.S.C. §1857c-5(a)(2)(B).

41 Section 107(a), 42 U.S.C. §1857c-2(a) and 110(a)(1), 42 U.S.C. §1857c-5(a)(1). Section 110(b) allows the Administrator to extend this deadline by up to 18 months.

42 Section 110(c)(3), 42 U.S.C. §1857c-5. §420.6(e) of the guidelines modifies this deadline by allowing submission of certain revisions of plans semiannually. 42 C.F.R. §420.6(e), 36 F.R. 15489.

43 Section 107(a), 42 U.S.C. §1857c-2(a).

44 Sections 110(a)(1) & (a)(2)(A), 42 U.S.C. §1857c-5(a)(1) & (2)(A).

45 42 CFR §466.15(a), 36 F.R. 24876.

46 40 CFR §§61.09, 61.34, 61.37(b), 61.55, 61.59, 36 F.R. 23239. *See also* the regulations setting motor vehicle emission standards, *supra*, note 35.

47 Section 304(a)(1), 42 U.S.C. §1857h-2(a)(1).

48 Section 113, 42 U.S.C. §1857c-8. This provision would seem to add another means for using Section 304 to compel states to enforce their implementation plans. Section 113(a)(1) allows the Administrator to issue an order compelling "any person" to comply with "any requirement" of an applicable implementation plan. Since a state is a "person" (Section 302(e)), and since one requirement of any implementation plan must be that the state enforce it in order to meet the ambient standard it implements on time (*see* page xxxi), the Administrator could issue an order requiring a state to enforce its plan, and such an order could be enforced under Section 304.

49 Though issued under state laws and regulations with the purpose of enforcing those laws and regulations, states' orders are nevertheless made "with respect to" emission standards and limitations in effect under the federal Clean Air Act. State implementation plans – including emission standards and limitations, and enforcement procedures – are made up of state laws and regulations but, once approved by EPA, go into effect under the federal Act.

C. Suits Against the Administrator

A citizen can sue the EPA Administrator to require the performance of any duty under the Act which is not discretionary. But many provisions that appear in non-discretionary form are in practice discretionary, and many others allow citizen plaintiffs to force the Administrator to do a good deal less than it appears. We attempt a categorization of these provisions here, but each should be examined individually to deter ne exactly what it requires the Administrator to do.

Many provisions make simple, clear, inescapable requirements of the Administrator. Section 110 (c)(1), for example, states that

> the Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if . . . the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

Or, Section 111(b)(1)(B) requires that, within 120 days after certain stationary sources are identified,

> The Administrator shall propose regulations, establishing federal standards of performance . . . .
>
> The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate.

The duty and the time or conditions under which it must be performed are clear and unvarying; failure to perform the duty is easy to demonstrate. The usefulness of the numerous provisions of of this sort is sometimes limited by their simplicity. Often citizens will want to influence the content of what the Administrator does, but a provision will require only that the Administrator act and will say little about how the act is to be carried out. Thus Section 111(b)(1)(B) says nothing about how new source standards are to be set other than to require opportunity for public comment. Nor does the Section say anything about the content of the standards beyond the definition of "standard of performance" which grants the Administrator discretion in setting the standard.[50] Thus a citizen plaintiff can sue the Administrator for failure to set standards on time and failure to allow public comment, but for little else.

In contrast, although Section 110(c)(1) says nothing about the content of the implementation plans the Administrator must propose if a state fails to submit any plan, the extensive requirements imposed by Section 110(a)(2) on states' plans would certainly apply to EPA's plans as well. Thus a citizen plaintiff would probably be able to sue the Administrator for failure to perform the non-discretionary act of proposing and promulgating a plan if he presented a plan that did not meet these requirements.

Similarly, Section 108(a)(2) requires the Administrator to issue air quality criteria for any air pollutant he has previously listed as harmful to public health and welfare. This requirement is followed by a series of specific conditions the criteria must meet, all of which can be taken as part of the non-discretionary requirements for issuance of air quality criteria.[51] In this, as in the previous example, the extent to which the additional conditions will be enforceable as part of the Administrator's non-discretionary duty is limited. For instance, the requirement that new air quality criteria "shall accurately reflect the latest scientific knowledge"[52] is non-discretionary in form, but in practice leaves the determination of what the latest scientific knowledge is and how it should be reflected in the criteria to the discretion of the Administrator. Courts will be reluctant to judge whether his determination is "accurate". A suit to enforce conditions like these is most likely to be successful where it can be shown that a clearly defined body of relevant material has been ignored.

In other cases, failure to perform an act will be more difficult to demonstrate, even though the requirement for its performance is stated clearly and in non-discretionary form. Section 103(a), for example, requires the Administrator to perform a series of cooperative research ventures on air pollution.[53] There is no timetable or deadline specified. The acts themselves, moreover, are not clearly defined. Thus it will be difficult to get a court to rule that the Administrator has failed to perform his duty, unless there has been complete failure to perform over a long period of time.

V. OBTAINING THE INFORMATION NEEDED FOR A CITIZEN SUIT

Information is the backbone of any successful suit against a polluter. This is recognized in the Senate Report:

> The information and other disclosure obligations required throughout the bill are important to the operation of this provision [Section 304]. The [Administrator] would have a special duty to make meaningful information on emitting sources available to the public on a timely basis.[54]

The critical points are monitoring and reporting. When a source must install continuous monitoring equipment and make results publicly available, including tape read-outs and other continuously gathered records, a citizen plaintiff should be able to base a suit on the polluter's own data.

Federal law allows the Administrator to impose monitoring and reporting requirements on any source owner,[55] and requires that any records, reports, or information obtained shall be available to the public, unless a polluter can prove to the satisfaction of the Administrator that the information is a bona-fide trade secret.[56]

Administrator Ruckelshaus has not chosen to exercise this power so far. The federal guidelines for implementation plans require only that the *state* submit periodic reports to EPA on "air quality" and "progress in carrying out the applicable plan."[57] But the regulations also require that state

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50 Section 111(a)(1), 42 U.S.C. §1857c-6(a)(1).

51 "Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on:

> "(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;
>
> (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and
>
> (C) any known or anticipated adverse effects on welfare." Section 108(a)(2), 42 U.S.C. §1857c-3.

52 *Id.*

53 Section 103(a)(1), 42 U.S.C. §1857b(a)(1).

54 Sen. Rep. at 38.

55 Section 114(a)(1), 42 U.S.C. §1857c-9(a)(1).

56 Section 114(c), 42 U.S.C. §1857c-9(c).

57 42 CFR §420.7(a) & (b), 36 F.R. 15489.

plans make publicly available the emission data reported by source owners or otherwise obtained by the agency and that the data be "correlated" with emission limitations or other measures, i.e.

> presented in such a manner as to show the relationship between measured or estimated amounts of such emissions allowable under the applicable emission limitations or other measures.[58]

EPA also requires that owners or operators of new or modified stationary sources submit information to the state agency on the nature and amounts of emissions, and the design, construction and operation of such sources, in order to determine whether the proposed construction or modification will violate the state control strategy or interfere with the attainment or maintenance of a National Air Quality Standard.[59] For existing sources, EPA requires that state plans provide for monitoring to assure compliance with state rules and regulations.[60]

To varying degrees, it may be argued that the record-keeping and reporting requirements in the guidelines have been imposed under the authority of Section 114 of the Act, and therefore carry with them the requirement of public availability.[61] Whether data required by the Administrator to be submitted to the state, but not to the federal EPA, qualifies as data required under Section 114 is not a closed question, but a good argument can be made that it is so required. It is more uncertain whether data submitted pursuant to the Administrator's regulations requiring a state to establish legally enforceable procedures for its collection is data required by the federal Administrator,[62] and therefore available to the public under Section 114.

Each state also has data-gathering and reporting provisions in its implementation plan. Most states provide for the minimum data collection and public availability required by federal law. Many states provide that only emission data, of unclear thoroughness and specificity, is required from polluters, and only emission data submitted to or gathered by the agency will be unconditionally available to the public. Many states have much broader loopholes for "trade secrets" or "confidential information" than Section 114(c) of the federal law. As a result, citizen plaintiffs may often find it more difficult than it should be to obtain the information they need.

Federal discovery rules will, of course, apply in Section 304 suits, and data may be obtainable by this means. But many corporations simply will not keep thorough records in the form needed for litigation if they are not required to by their state agency. Hence discovery, while always a valuable tool, may not provide the information needed by the citizen plaintiff.

Citizens may also be able to stimulate federal action against a polluter by making a *prima facie* showing of a violation to the Administrator, and asking him to invoke his powers under Section 114 to force the source to keep adequate records. These records would then become available to the public by operation of Section 114(c). A similar showing might also prod a state agency to require such data gathering.

Failing these methods of obtaining information, a citizen can turn to his or her state agency. This might produce evidence before litigation is commenced at no cost to the citizen, but it is a matter of agency discretion whether to supply the information to the citizen. The last resort is for the citizen to collect information directly; this is costly, difficult and time-consuming.

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58 42 CFR §420.10(e), 36 F.R. 15489.

59 42 CFR §420.18(b), 36 F.R. 15493.

60 42 CFR §420.19(a), 36 F.R. 15493.

61 In proposing these regulations, the Administrator invoked Section 301(a) of the Act, which grants him general power to promulgate regulations to carry out the provisions of "this Act." Hence the legal authority on which the regulations are based is not limited to Section 110, the section dealing with implementation plans. As a result, legal authority can be sought elsewhere in the Act – i.e., in Section 114.

62 *See* Section 114(a) & (a)(1), 42 U.S.C. §1857c-9(a) & (a)(1).

VI. OTHER MEANS FOR OBTAINING FEDERAL ENFORCEMENT – SECTION 113

Citizens should not overlook the possibility of bringing the federal EPA into enforcement through the "finding" procedures of Section 113. Under this section, the federal Administrator must[63] take action if, "based on any information available to him", he makes any of the following "findings:"

> (1) that any person (e.g., a polluter or a state agency) is violating any applicable provision of a state implementation plan; or
>
> (2) that violations of an applicable implementation plan are so widespread as to "appear to result from a failure of the State ... to enforce the plan effectively."[64]

Whenever the Administrator makes either of these findings, he must give notice to the affected person. In addition, he *may*, after giving notice, or after making a finding that a person is violating a requirement imposed under Section 114, issue an order or commence a civil action of his own against the violator.[65]

For citizens, the value of these provisions is that they provide a mechanism for setting federal enforcement machinery into motion. Citizens can submit documented information to the Administrator and formally request that he act under the powers granted him by the Act.

VII. THE COSTS OF A CITIZEN SUIT AND HOW TO PAY THEM

Whether citizens will be able to act as a major enforcement arm for the Clean Air Amendments depends on whether they can shoulder the financial burden to see a case through.

Section 304(d) gives the court discretion to grant litigation costs, including reasonable expert witness and attorney's fees, "whenever the court determines such an award is appropriate."[66] This provision must be read along with the intent of the legislature:

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendent abated a violation, the court may award litigation expenses borne by plaintiffs in prosecuting such actions.[67]

The fees provision does not go as far as it might. The Act does not provide for recovery of damages by the plaintiff. The plaintiff can never be certain he will receive anything towards his costs and fees, and if he does, payment will not come until the end of what may be drawn-out and expensive proceedings. Also, the court may require a bond whenever a citizen plaintiff asks for a temporary injunction or restraining order. Finally, costs and fees can also be granted to a *defendant* if the court finds that a plaintiff's suit was not meritorious.[68]

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63 That is, he has a non-discretionary duty to take action within the meaning of Section 304.

64 Section 113(a)(1) & (2), 42 U.S.C. §1857c-8(a)(1) & (2).

65 Section 113(a)(3), 42 U.S.C. §1857c-8(a)(3).

66 Section 304(d), 42 U.S.C. §1857h-2(d).

67 Sen. Rep. at 38.

68 Section 304(d), 42 U.S.C. §1857h-2(d).

The dangers lurking in Section 304's provision for bonds may have been substantially reduced by a number of recent court decisions. In *Natural Resources Defense Council v. Morton*, – F. Supp. –, 3 ERC 1473 (D.D.C. 1971), three public interest groups (NRDC, Friends of the Earth, and the Sierra Club) obtained a preliminary injunction against the lease for oil and gas drilling of more than 300,000 acres of land off the Gulf Coast on the grounds that the Department of Interior's NEPA statement was inadequate. Interior asked for a bond of $750,000 immediately plus $2,500,000 for each month's delay caused by the temporary injunction. The court, noting that federal judges were granted great discretion with respect to requiring bonds, held that requiring three non-profit organizations to post bond in such an amount would have the effect of denying them judicial review of the Department's actions under NEPA, and that since this would "stifle the intent of the Act,"[69] the court would not grant the requested bond. The court also pointed out the value of the other public interests in the Gulf Coast area, such as the fish and shell fish industries, the fact that the area is a great habitat for marine and other wildlife, and its value for recreation. It set bond in the amount of $100.00 with the statement:

> The Court believes that the public interest will be far more gravely damaged by failure of the courts to rigorously and consistently enforce NEPA than by any harm which could possibly result from delaying this lease sale long enough to resolve the important legal issues presented by this suit.[70]

In view of this and other similar decisions,[71] it does not seem likely that federal courts will require large bonds for suits under Section 304. The policy of the Clean Air Amendments strongly favors citizen enforcement, and federal courts should be at least as reluctant to impose bonds which would effectively prevent citizens from suing under this Act as under NEPA. Citizens should also be able to counter polluters' cost arguments with the argument used by the court in *NRDC v. Morton*, concerning the other public values, namely public health and welfare, which are served by making it possible for citizens to bring suit under Section 304.

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69 3 ERC 1473, – F. Supp. –, (D.D.C. 1971).

70 3 ERC at 1476, – F. Supp. –.

71 The court also cited a number of other cases where nominal bonds had been required of environmental groups suing in the public interest: *Environmental Defense Fund v. Corps of Engineers* (Tennessee Tombigbee), 3 ERC 2085, – F. Supp. – (D.D.C. 1971) ($1.00); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 2 ERC 1422, – F. 2d – (4th Cir. 1971) ($100.00); and *Wilderness Society v. Hickel*, 1 ERC 1335, – F. Supp. – (D.D.C. 1970) ($100.00).

LEGAL HELP

Many non-profit organizations do not know where to turn when looking for help with legal matters. There is a source of aid and support in the New York–New Jersey–Connecticut Metropolitan area which should be more fully utilized. The Council of New York Law Associates provides volunteer legal assistance to non-profit organizations engaged in *pro bono publico* programs. The majority of the Council's 1,500 members are associates in Wall Street or Park Avenue firms who have used and developed their expertise in projects ranging from legislative drafting to full scale litigation. Attorneys in the Council take on *pro bono* projects and cases on a part-time basis. There are similar Councils in other parts of the country and information on them can be obtained through the New York Council.

In addition, many attorneys in the Council are interested in full time employment with non-profit and public interest groups both in New York and across the country. The Council runs a free placement service and is very interested in hearing from groups looking for full-time attorneys.

For further information on all aspects of the program, contact Susan Belgard, Director, Public Service Placement Bureau, Room 510, 36 West 44th Street, New York, New York 10036 (212 972-9370).

EXHIBIT 2

OPINION OF THE COURT IN THE CASE OF

HARLEM TRANSPORTATION ASSOCIATION, ET AL., v.

GEORGE M. STAFFORD, ET AL.,

73 CIV. NO. 1330 (D.C.S.D.N.Y., JUNE 21, 1973)

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the court to vacate the Comp-

York v. *United States*, *supra*, confronted a similar problem ether to vacate an Interstate mmission order authorizing a small railroad line. There, mmission totally failed to con- ntal factors [2] in a proceeding d raised "a substantial ques- damage to the environment", 159, n. 11. After noting that er to remand for what may rtualistic act," *id.* at 159, the the application to the Inter- Commission concluding that ions do not justify the Com- rd of the law," *id.* at 160. ever, refused to vacate the der:

not compelled. In reviewing n's action, we sit as a court vers, and as such 'may adjust gencies of the case in accord- rquitable principles govern- ion. The purpose of judicial nant with that of the adminis- ding itself,—to secure a just nimum of technical require-

Hanly II, 471 F.2d at 836. *York*, the special circum- this court's refusal to va- ller's preliminary decision. as taken all relevant factors ended by NEPA, and it ap- tial decision will not ulti- should the order be vacated consider *ab initio*.

NCLUSION

t must decide whether re- troller for further review of sistent with the procedural PA is warranted.[24] For the e in this opinion, the court mptroller's failure to com- al requirements of the Act

e applicability of NEPA was by plaintiffs on appeal of the

ork, Judge Friendly sent the for abandonment back to the Commission for reconsider- ing, however, the Interstate 's final order remained in ef- s find it necessary to remand ant consider the question of ller's statutory authority or to continue his review of an charter while the bank itself operations.

in this case does not justify further suspension of his order.[25] In so deciding, the court finds itself in the position of adding to a trend which protests its concern for NEPA, and yet finds that NEPA's technical provisions have been violated,[26] and overlooks these violations in favor of the final agency decision. However, in reaching a conclusion on remand, this court must balance the public interest against the demonstrated environmental costs of the Comptroller's action. Cf. *Calvert Cliffs Coordinating Committee v. USAEC*, ____ U.S. App. D.C. at ____, 449 F.2d at 1123 [2 ERC 1779]. The court, therefore, finds that the Comptroller's decision to create the Second National Bank of Homestead should not be upset.

For the foregoing reasons, the court will deny the motion for preliminary injunction by plaintiffs and dismiss the complaint. Fed.R.Civ.P. 12(b)(6). The court does not find it necessary to expressly rule on the cross motions to dismiss by the defendant Comptroller and the defendant-intervenor Bank.

It is, therefore, this 15th day of June, 1973,

ORDERED that plaintiffs' motion for a preliminary injunction be, and it hereby is, denied; and it is further

ORDERED, that the complaint herein be, and it hereby is, dismissed.

[25] It might be argued that this decision may work to subvert the integrity and purpose of NEPA. See Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Comm., ____ U.S. App. D.C. ____, 449 F.2d 1109, [2 ERC 1779] (1971); City of New York v. United States, *supra*. However, preservation of the integrity of the Act requires that it be shielded from the abuse and misuse which would result if the Act is used in the circumstances of this case simply to delay the Comptroller's actions. Cf. Hanly II, *supra*, at 837 (Friendly, C. J., dissenting).

[26] See, e.g., Hanly I & II, *supra*; City of New York v. United States, *supra*.

HARLEM VALLEY v. STAFFORD

U.S. District Court
Southern District of New York

HARLEM VALLEY TRANSPORTATION ASSOCIATION, et al., v. GEORGE M. STAFFORD, et al., No. 73 Civ. 1330, June 21, 1973

LAND

1. Federal, state, and local regulation — Transportation — In general (§8.351)

Court jurisdiction and procedure — Parties — Standing (§15.212)

Environmental groups alleging that abandonment of railroad lines will cause their members economic injury and personal inconvenience and will subject them to increased noise and air pollution stemming from increased truck traffic have standing to bring federal district court suit challenging Interstate Commerce Commission's refusal to comply with National Environmental Policy Act prior to its commencement of hearings on proposed abandonment.

2. Federal, state, and local regulation — Transportation — In general (§8.351)

Federal, state, and local regulation — Administrative agencies — Procedure before agencies (§8.621)

National Environmental Policy Act requires Interstate Commerce Commission to determine, prior to commencement of any commission proceedings on proposed railroad line abandonment, whether abandonment proceeding constitutes major federal action significantly affecting environment and, if so, to prepare and circulate environmental impact statement concerning abandonment's environmental effects.

STATUTES

Federal — National Environmental Policy Act (§95.011)

Construed.

William Hoppen, New York, N.Y., for Harlem Valley Transportation Association, Thomas L. Creel and Stuart J. Sinder, New York, for Natural Resources Defense Council.

Fritz R. Kahn, general counsel, Arthur J. Cerra, deputy general counsel, and James F. Tao, Interstate Commerce Commission, Washington, D.C.; Paul J. Curran, U.S. attorney, Christopher Roosevelt, and Daniel Riesel, assistant U.S. attorneys, New York, for defendants.

Full Text of Opinion

FRANKEL, D. J.

Plaintiffs seek declaratory and injunctive relief against alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) ("NEPA"), in the procedures attendant upon abandonments of rail lines under the jurisdiction of the Interstate Commerce Commission. The plaintiffs are an array of public-interest corporations and associations, business corporations, and individuals variously interested in continued rail service, the quality of the air they breathe, and the quality of their environment more generally. They invoke the jurisdiction of this court under an array of statutes only some of which need be mentioned, as they are in the margin.[1]

In a complaint amended speedily during the pendency of motions now to be decided, the plaintiffs seek to maintain the proceeding as a class action under Fed. R. Civ. P. 23(b)(2), alleging that they can and do represent

> "those adversely affected by the failure of defendants to carry out their statutory duties under the National Environmental Policy Act * * * with regard to the proposed abandonment of rail lines in the Northeast and in the United States and in the performance of their administrative duties under the law, particularly as they relate to restructuring of railroads in the Northeast, and generally those citizens and residents of the United States who are or who will be injured by the abandonment of rail service and rail lines in particular states of the United States in which such abandonments are or may be proposed by the carriers and approved by the Interstate Commerce Commission without compliance with the law aforesaid."[2]

Defendants are the ICC, its Chairman, and, unimportantly for present (and probably all) purposes of this case, the Administrator of the Environmental Protection Agency.[3]

Plaintiffs have moved for a temporary injunction. Simply but sufficiently stated for introductory purposes, their prayer is that the ICC be enjoined pendente lite from going forward with proposed rail abandonment proceedings unless a draft environmental impact statement has been prepared and circulated by the Commission staff prior to any hearings as required, according to plaintiffs, by § 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C).

According to the complaint and essentially

[1] Defendants have not questioned the jurisdiction of the district court except for the contention of the ICC that the case should be before three judges rather than one. That contention is discussed and overruled at a later point in the text of this opinion. As to the grounds of jurisdiction apart from that, the court holds that the case is properly here at least under 28 U.S.C. § 1361 (1970), the so-called mandamus provision. See, e.g., Roberts v. United States, 176 U.S. 221, 231 (1900); Langevin v. Cheyenne Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971); Peoples v. United States Department of Agriculture, 427 F.2d 561, 565 (D.C. Cir. 1970); Earls v. Resor, 327 F.Supp. 354 (S.D. N.Y. 1970); Cares v. Local Draft Bd. No. 2, Hartford, Conn., 297 F.Supp. 252 (D. Conn), aff'd, 412 F.2d 71 (2d Cir. 1969).

Additional or alternative bases for the jurisdiction of the court would appear to exist in the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1970), see Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 101-102 [1 ERC 1237] (2d Cir.), cert. denied, 400 U.S. 949 (1970); Kletschka v. Driver, 411 F.2d 436, 445 (2d Cir. 1969); Toilet Goods Assoc'n v. Gardner, 360 F.2d 677, 679 n.1 (2d Cir. 1966), aff'd, 387 U.S. 158 (1967), along with (or as well as) 28 U.S.C. § 1331 (1970).

It is of at least passing interest to note that the complaint in Hanly v. Mitchell, 460 F.2d 640 [4 ERC 1152] (2d Cir.), cert. denied, Hanly v. Kleindienst, ____ U.S. ____ [4 ERC 1745] (1972), another controversy concerning NEPA procedures, invoked a number of jurisdictional bases, including NEPA itself, which seem to have been so clearly sufficient that neither Judge Tenney in this court nor the Second Circuit in its review appears to have found occasion to deal expressly with the subject.

[2] In order to supply clarification of plaintiffs' class-action allegations and to make more precise some subjects discussed during oral argument, the court suggested the filing of an amended complaint at the hearing of the motion for a preliminary injunction on June 6, 1973. The defendants have raised the technical objection that "leave" for such an amended pleading had not been given. In the circumstances, the objection is without merit. Leave is now given to do what the court proposed.

Furthermore, the subject has become inconsequential. One of the court's main concerns during the hearing of the motion for a preliminary injunction was the question whether the plaintiffs, if they could prove entitlement to any relief, could legitimately seek a restraint of nationwide effect when their alleged interests might be of narrower geographic scope. Both the United States and the ICC have now not only conceded, but insisted, that a preliminary injunction in this case would "affect the agency in the entire scope of its authority and jurisdiction." Defendants' Supplemental Memorandum 4. Reiterating this, the defendants say:

> "Any action by this Court based on plaintiffs' individual interests and the public interest will affect the agency's procedures and the application of said procedures anywhere within the scope of the agency's jurisdiction." *Id.* at 4-5.

In these circumstances, it becomes unimportant to decide at this early stage whether the action may proceed as a class suit. The court will, therefore, leave this determination to be made in the normal course pursuant to our District's Civil Rule 11A(c).

[3] It was acknowledged in oral argument that no relief is now sought against the EPA through the motion being decided today.

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undisputed portions of the motion papers, there are now pending, in the northeast and elsewhere across the country, a number of proceedings and proposed proceedings under 49 U.S.C. § 1(18)-(20)(1970) wherein the ICC is asked to approve abandonment of all or portions of lines of railroads or the operation thereof. Such abandonments, if allowed, will or may in specific cases have environmental impacts of varying kinds and degrees, most importantly perhaps on air quality because of the increased pollution produced by increased truck and auto traffic. In addition, though less significantly for our immediate concerns, plaintiffs charge that the ICC is considering individual abandonment proposals in isolation from each other and that the failure to consider effects "on the rail transit system as a whole is in violation of national environmental policy and • • • national transportation policy."

Of direct interest at the moment is plaintiffs' claim of non-compliance with NEPA § 102(2)(C), which provides:

> "The Congress authorizes and directs that, to the fullest extent possible • • • (2) all agencies of the Federal Government shall—
>
> • • •
>
> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes."

To particularize plaintiffs' claim as it came to be specified in the course of briefing and oral argument, they concede that (a) an environmental impact statement is required only for "major Federal actions significantly affecting the quality of the human environment," (b) the threshold determination whether an "action" falls within this class is, at least initially, for the responsible agency, and (c) a negative decision on this question in any particular abandonment proceeding may be deemed beyond the reach of the injunctive relief sought herein. What plaintiffs assail is the ICC's view that NEPA § 102(2)(C) requires no agency action in an abandonment proceeding until the initial decision, *following a hearing*, by the administrative judge. It is plaintiffs' contention that the agency must (1) determine at the outset if the particular proceedings involve "major Federal actions significantly affecting the quality of the human environment," and, if the answer to that is affirmative, (2) require its staff to prepare and circulate a draft impact statement prior to the commencement of any hearing, so that evidence and argument may be adduced with reference to the draft. In their motion now to be decided plaintiffs seek a preliminary injunction enforcing these contentions.

Opposing the motion on the merits, the ICC argues that NEPA "does not require the issuance of an environment impact statement prior to any hearing on a proposed abandonment."[4] In this, reflecting one of the recurrent but still quaint charms of our political and legal system,[5] the executive comes disunited to the courthouse: the "United States," as the Department of Justice is permissibly styled, shares plaintiffs' view that a draft impact statement is required before the hearing.[6] On a logically prior question, however, the two agencies are agreed that plaintiffs' action, or at least their pending motion, must be rejected. Thus, both the ICC and the Department of Justice argue that the suit is barred because of failure to exhaust administrative remedies.

To this threshold defense, the ICC alone adds two others:

(1) The action is properly for a three-judge court under 28 U.S.C. §§ 2284 and 2321-2325 (1970), with the United States as a defendant, so that plaintiffs have erred fatally in (a) coming to a single district judge and (b) failing to name the United States as a defendant.

(2) The plaintiffs lack standing.

It is convenient, if not compulsory, to treat the issues in a legally logical order.

1. *A three-judge court is not required.*

This subject is not without interest and complexity. The court concludes, however, that it is suitable for narrow decision in the circumstances of this case, and that the claimed requirement of three judges is not applicable.

The position that this case is for a three-judge court had its inception when plaintiffs were thought to be attacking orders of abandonment already issued.[7] It became clear, however, in the course of hearing the present motion, that no such attack was genuinely intended. Plaintiffs have now concluded that they are not seeking in this action to enjoin or set aside any authorizations already issued by the ICC allowing abandonment of lines or their operation.

A further limitation on the nature of the issue should be noted. The ICC claims that its regulation governing this matter does not call for a draft impact statement at the initial stage when plaintiffs claim it is required. The position is that this suit seeks to invalidate "procedures • • • prescribed by an agency order • • • [which] may only be attacked by a three-judge district court which alone possesses the authority to enjoin or set them aside."[8] The Commission invokes for this argument such cases as Frozen Food Express v. United States, 351 U.S. 40 (1956, and Lambert Co. v. Balt. & Ohio R.R. Co., 258 U.S. 377 (1922).

It is perhaps a sufficient answer that the cases on which the ICC relies involved regulations having the nature of substantive law—i.e., being determinative or dispositive of substantive rights rather than procedural incidents in the administrative process. See also Columbia System v. United States, 316 U.S. 407 (1942).

Whether or not that is sufficient, another circumstance seems important in this case. The ICC acknowledges that at the time of the decision of Greene County Planning Bd. v. Federal Power Commission, 455 F.2d 412 [3 ERC 1595] (2d Cir.), cert. denied, 409 U.S. 849 [4 ERC 1752] (1972), now found to be controlling in this case (see *infra*), there was no ICC regulation governing the procedural question before us. On the contrary, the ICC at that time represented, both to our Court of Appeals and to the Supreme Court, that *Greene County*, unless overturned, would require draft impact statements at the outset of the hearings in ICC cases. The ICC concedes that if the situation had remained in that posture, there being no regulation providing a procedure different from that ordered by *Greene County*, this would be a proper case for a single judge rather than three judges.

In these peculiar circumstances, it seems insubstantial to claim that the ICC's adoption of a supervening regulation, assertedly altering what it saw *Greene County* to state, should aggrandize this case to the status of one under the Urgent Deficiencies Act.

Finally, quite apart from this peculiarity of this specific case, there is apposite precedent limiting the Urgent Deficiencies Act jurisdiction. Three-judge court review will not lie where the order complained of is "one which does not command the [party] to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the [party] to any liability, civil or criminal; which does not change the [party's] existing or future status or condition; which does not determine any right or obligation." United States v. Los Angeles R.R., 273 U.S. 299, 309-10 (1927). See also Columbia System v. United States, *supra*. In this case no rights have been determined by the administrative action in question. The effort, as hereinafter characterized, is simply one to enforce compliance with a plain legal requirement governing the agency's proceeding. It follows, therefore, within the rule of Kansas City So. Ry. v. I.C.C., 252 U.S. 178 (1920), that this is a proper case for consideration of mandamus by a single judge rather than the kind of cumbersome review (with direct access to the Supreme Court) provided for cases within the Urgent Deficiencies Act.

2. *The exhaustion doctrine is not a bar.*

The ideas of "exhaustion" and "finality" as prerequisites for review of administrative orders are sometimes amorphous and sometimes difficult to keep neatly separate. See Gellhorn & Byse, *Administrative Law* 213 (5th ed. 1970). So the court should not and does not claim certainty when it expresses the view that defendants here probably mean to be claiming non-finality rather than failure to exhaust in their contention that this action is premature. See Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 589 n.8, 591 [2

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[3] ICC Memorandum of Law in Opposition 1B.

[4] Cf., e.g., Secretary of Agriculture v. United States, 350 U.S. 162 (1956); United States v. I.C.C., 337 U.S. 426 (1949).

[5] Without dissent from any party or the court, separate briefs have been filed and separate counsel have appeared for Justice and the ICC.

[6] As noted earlier, the pertinent statutes are 28 U.S.C. §§ 2284 and 2321-25 (1970). The focus is, of course, on 28 U.S.C. § 2325, which provides for a three-judge court determination of an application for an interlocutory injunction "restraining the enforcement, operation or execution, in whole or in part, of *any order* of the Interstate Commerce Commission" (emphasis added).

[7] I.C.C. Memorandum of Law in Opposition 6b.

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ERC 1114] (D.C. Dir. 1971). At any rate, however denominated, the argument is unsound.

It seems sufficient to cite for this point, as well as the merits, the decision in Greene County Planning Bd. v. Federal Power Commission, 455 F.2d 412 [3 ERC 1595] (2d Cir.), cert. denied, 409 U.S. 849 [4 ERC 1752] (1972). There, in the early stages, the Federal Power Commission sought dismissal of the review proceeding upon the asserted ground that the order refusing a draft impact statement under NEPA was "interlocutory" and therefore unreviewable. While that argument was dropped when the case came to be briefed on the merits, a similar position was taken with respect to the Commission's order denying petitioner's request for attorneys' fees and expenses for conducting the administrative proceeding. The Court of Appeals rejected the argument and reviewed the question of fees and expenses. 455 F.2d at 425-26.

The reasons making both the NEPA and the fees-and-expenses questions reviewable there are applicable here. The NEPA problem is substantially identical. The other question in *Greene County* is identical in principle. The orders in each instance are complete, likely to wreak irreparable injury if wrong,[9] and effectively reviewable only now rather than later. See also Environmental Defense Fund, Inc. v. Ruckelshaus, *supra* at 589, 592 n. 20.

3. *Plaintiffs make a sufficient showing of standing.*

Various members of the plaintiff organizations and the other plaintiffs, all of whom reside or have businesses located in the Harlem Valley region, have submitted affidavits alleging injury from the defendants' failure to comply with both procedural and substantive NEPA requirements. As to the specific matter of a draft impact statement, plaintiffs contend that they have limited resources, and will be unable effectively to present and analyze environmental factors at the hearings in the absence of such a statement prepared in advance by the ICC staff. The hearing records on environmental considerations are therefore likely to be inadequate, enhancing the prospects of improvident abandonments approved at unlawful costs in environmental injury. Consequently, as residents of the Harlem Valley, plaintiffs contend they will be made wrongfully to suffer from increased noise and air pollution caused by increased truck traffic. In addition, plaintiffs allege both economic injury and personal inconvenience from the loss of rail transportation.

[1] These assertions are sufficient, and sufficiently documented for present purposes, to confer standing. United States v. Students Challenging Regulatory Agency Procedures, ___ U.S. ___, ___ ___ [5 ERC 1449] (1973). "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." Sierra Club v. Morton,, 405 U.S. 77, 734 [3 ERC 2039] (1972).

It is clear, as shown in the two Supreme Court decisions just cited, that plaintiffs' alleged injuries are within the zone of interests protected or regulated by NEPA. Cf. Data Processing Service v. Camp, 397 U.S. 150 (1970). The congressional purpose in promulgating NEPA was, in part, to "promote efforts which will prevent or eliminate damage to the environment * * * and stimulate the health and welfare of man," 42 U.S.C. § 4321. NEPA proclaims the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," 42 U.S.C. § 4331(a). It decrees that "each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331(c). Those are the ultimate substantive goals to which NEPA, including its provisions for impact statements, is addressed.

The plaintiff organizations have standing to sue on behalf of their injured members. See Sierra Club v. Morton, supra at 739. Without depreciating the role of any plaintiff, we may note that the Natural Resources Defense Council (NRDC), a non-profit national organization with approximately 10,000 members or contributors, is particularly fitted to bring this suit for its members. As part of its activities, the NRDC has long been concerned with NEPA problems. It has repeatedly participated in the formulation of agency rules implementing NEPA, including rules of the Council on Environmental Quality. In addition, NRDC has participated in hearings and public review of proposed highway transportation plans, engaged in a year-long survey of federal energy policy decision-making, and prepared and disseminated educational materials concerning provisions of the significant 1970 amendments to the Clean Air Act, 42 U.S.C. § 1857 *et seq.* As part of the latter project, NRDC representatives have testified at Senate hearings overseeing implementation

[9] The term "irreparable" may be literally debatable, but it applies here as it did in *Greene County*. There as here, the agency's action, if erroneous, could later have been "repaired" by having the hearing process done all over after reversal of a "final" order.

of the amendments and engaged in litigation testing the Environmental Protection Agency's interpretation of those amendments. In sum, the interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

4. *Plaintiffs are entitled to a temporary injunction*

As mentioned earlier, the merits of this case have opened fissures in the executive ranks. The divisions have been not only spatial, as it were, among the agencies, but seemingly even temporal, within a single agency. After the decision in Greene County Planning Board v. Federal Power Commission, supra, the ICC sought leave to file an amicus brief on the petition for rehearing en banc, arguing that the decision, "if allowed to stand [would] compel a substantial number of * * * agencies—including the Interstate Commerce Commission—* * * to assign a staff of employees to the task of preparing [draft impact] statements * * *." The Solicitor General, in his unsuccessful petition for certiorari, spoke to the same effect, noting expressions of "particular concern" by the ICC and the CAB if the *Greene County* decision remained unreversed. Moreover, before the certiorari petition was filed, the ICC apparently found itself constrained (and able) to file a draft impact statement prior to hearing in an abandonment proceeding, "consonant with [the procedure] mandated in *"Greene County*, City of New York v. United States, 344 F.Supp. 929, 939 [4 ERC 1646] (E.D. N.Y. 1972) (3-judge court).

Upon further study the ICC claims to have managed (while the Justice Department has failed) to find its situation distinguishable from *Greene County*. The fact of a shift does not, of course, serve in itself to invalidate the new position. Upon inspection, however, the Commission's arguments fail to avoid the squarely controlling authority of *Greene County*, by which this court is bound. Indeed, most of the arguments now tendered were explicitly rejected in the decision of the Second Circuit. To the extent this is not literally the case, the ICC's contentions are not in any event substantial. So, for example, the agency urges that its staff, unlike the Federal Power Commissions's, does not participate in the hearing before the administrative judge. Hence, it is argued, nobody is there to make a draft impact statement—or, in the language of the ICC brief (p. 25), "the *Greene County* requirement that an impact statement be served by the participating agency staff member prior to the hearing is entirely inappropriate."

The short answer is the one the ICC perceived, though without joy, in its amicus presentation on the *Greene County* petition for rehearing. As that brief complained, the rule of *Greene County* required the assignment of staff members—"an assignment for which," the ICC protested, "there are no budgeted funds and no authorized increase in personnel." In turning a deaf ear to that plea, the Circuit may have deemed sympathy an inapposite response. Compliance with the law frequently entails expense as well as other strains. It is to be hoped that the creative flexibility of the administrative agency can encompass the locating of personnel (as it already has in one instance mentioned above) for such fundamental purpose.

[2] In sum, plaintiffs' motion will be granted. The court will order the ICC (1) to determine at the outset of abandonment proceedings whether "major Federal actions significantly affecting the quality of the human environment" are involved within the meaning of 42 U.S.C. § 4332(2) (C), and, if so, (2) to require staff preparation of a draft impact statement for circulation to the parties and further use in the agency process as the statute requires.[10]

Settle order.[11]

[10] It is not necessary to decide today what may happen if there is a dispute in some instance over an initial ICC determination that a particular case is not in the category of "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332 (2)(C), thus obviating the need for an impact statement. The determination would be open, of course, to judicial scrutiny. Hanly v. Mitchell, 460 F.2d 640 [4 ERC 1152] (2d Cir.), cert. denied, Hanly v. Kleindienst, ___ U.S. ___ [4 ERC 1745] (1972); Hanly v. Kleindienst, 471 F.2d 823 [4 ERC 1785] (2d Cir. 1972). But we need not consider whether such a specific ruling in a particular case, involving particular facts and, presumably, a particular exercise of judgment, would be immediately reviewable, by mandamus or otherwise.

[11] The Baltimore & Ohio Railroad Company and the Chesapeake & Ohio Railway Company (B&O and C&O), the trustees of the property of Penn Central Transportation Company (Penn Central) and the trustees of the property of Erie Lackawanna Railway Company (Erie) have sought to intervene as defendants in this action. The Association of American Railroads requests leave to appear as amicus curiae. The United States opposes the intervention applications.

At oral argument, Penn Central agreed that its motion to intervene should be denied, without prejudice to its renewal at a later date, and asked leave to appear as amicus curiae. Such leave is now granted to both Penn Central and the Association of American Railroads.

As for Erie, this movant has not accompanied its "petition" to intervene with a proposed pleading